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No. _____

In The

Supreme Court of the United States

October Term, 1990

THE CONE CORPORATION, et al.,

Petitioners,

v.

FLORIDA DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. After the district court found that Florida DOT's use of race-conscious bid specifications and "goals" in public construction contracting was unconstitutional because there is no factual basis for finding a "compelling interest", did the Court of Appeals err in holding that contractors – at whom the program's requirements are directed and who must comply with those requirements to have their bids deemed "responsive" – did not have standing to challenge the constitutionality of the program?

2. May the federal government condition a grant of funds to a State on the use by the State of race-conscious bid specifications and "goals" in public construction contracting in the *absence* of any evidence that such specifications and "goals" are necessary to remedy any identified current discrimination or any identified effects of past discrimination in any relevant market?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	The Cone Corporation; C.H. Barco Contracting Company; Asphalt Pavers, Inc.; Hewitt Contracting Co., Inc.; J.W. Conner & Sons, Inc.; Cone Constructors, Inc.; Leware Construction Company; Capeletti Brothers, Inc.; and O.B. Brooks & Sons Grassing, Inc.
Respondents:	Florida Department of Transportation; and Mr. Ben G. Watts

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2. Before implementing a race-conscious program in public contracting, a State must show that such use is necessary to remedy discrimination in that market; even if it does so in order to obtain federal funds, its use of race-conscious measures must be supported by such a showing. 20

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OPINIONS BELOW

The district court adopted, without modification, the report and recommendation of its magistrate. That opinion is unreported and is reproduced in the appendix to this petition at App.i. The Court of Appeals' opinion is reported at 921 F.2d 1190 (11th Cir., 1991), and is also reproduced in the appendix at App.1.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on January 8, 1991, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Relevant constitutional provisions, statutes and regulations reprinted in the Appendix at page App.106.

STATEMENT OF THE CASE

This case, challenging constitutionality of the Florida Department of Transportation's use of race-conscious[1]

[1] The statutes and regulations in question require the use of race-, ethnic-, and gender-conscious bid specifications and

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bid specifications and "goals" was filed by several non-"disadvantaged"[2] highway construction contractors in February, 1988.

A hearing was held on petitioners' request for a preliminary injunction in March of 1988. At that hearing two witnesses, representing two of the petitioners, testified as to the effects the use of race-conscious bid specifications and "goals" had on their businesses. Mr. Cone (president of the Cone Corporation, a prime contractor)

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"goals". For the sake of convenience, these are referred to in this petition collectively as "race-conscious".

[2] Although the bid specifications and "goals" speak in terms of preferences for "disadvantaged" business enterprises, there is a presumption of "disadvantage" based on race, ethnicity and sex. This is, in fact, classification by race, ethnicity and sex.

> The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit – access to a presumption of social and economic disadvantage that is the key to valuable entitlements – on grounds that *Croson* forbids a state to use without establishing that the purpose is to rectify invidious discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Croson* by pronouncing entire racial and ethnic groups to be disadvantaged.
>
> *Milwaukee County Pavers Ass'n v. Feidler*, 922 F.2d 419, 422 (7th Cir., 1991)

and Mr. Brooks (of O.B. Brooks & Sons Grassing, a subcontractor) both testified that Mr. Brooks' company did not receive a subcontract from Mr. Cone's company because Mr. Cone's company had to utilize a higher bid received from a DBE contractor to meet Florida's program goals, preliminary injunction hearing transcript, pp.39-40; 63-66; plaintiff's ex.13. Thus, Mr. Brooks' company lost a job and Mr. Cone's company had to pay thousands of dollars more for the work because of the program's existence and enforcement. The project was specifically identified and a letter from Mr. Cone's company to Mr. Brooks (ex.13), explaining the circumstances of Mr. Brooks' losing the job, was entered into evidence. Both witnesses also testified to various other effects the FDOT's DBE program had on their businesses. The district court denied the motion for an injunction, district court opinion, p.2, n.2, App.56.[3]

Following this Court's decision in *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706 (1989), the petitioners moved for summary judgment, district court opinion, p.2, App.56, and renewed their motion for a preliminary injunction, *id.* The district court referred the motions to a Magistrate, district court opinion, p.3, App.56 and then adopted the Magistrate's Report and Recommendation as its own opinion and order on August 1, 1989.

The district court held that, on the existing facts and as to contracts funded solely with State monies, the use of

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[3] References to the "opinion" of the district court refer to the Report and Recommendation of the Magistrate, which was adopted without modification by the district court.

race-conscious bid specifications and "goals" was unconstitutional, district court opinion, p.18, App.72. It found:

> [T]here were no findings of any sort made by the Florida Legislature (or the Department of Transportation, for that matter) when it enacted the challenged statute, §339.0805, Fla.Stat. Thus, there is no evidence in this record that the Florida statute, and the rules that implement the statute, were based upon legislative findings of prior racial or ethnic discrimination within the Florida highway construction industry, or by the State in its administration of the Florida highway construction program.
>
> District court opinion, p.17, App.71.

The court also held, however, that despite the lack of any factual support for a finding of identified discrimination in the construction industry in Florida, Florida *may* utilize those same race-conscious bid specifications and "goals" on contracts which are, in part, funded with federal monies, district court opinion, p.50, App.102.

The petitioners appealed from the determination of constitutionality with regard to the use of federal funds. The Court of Appeals held that – despite the unconstitutionality of the FDOT requirements – the petitioners lacked standing to challenge *any* aspect of the DBE program in Florida, vacated the district court's order and ordered the case remanded with instructions to dismiss.[4]

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[4] The Court of Appeals held that, because the Secretary of FDOT had discretion to waive the use of race-conscious

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FDOT's use of race-conscious bid specifications and "goals" requires contractors, in order to have their bids deemed "responsive", first to determine and then to take into account the race, ethnicity and sex of subcontractors in making their subcontracting decisions. Non-DBE contractors must utilize DBE subcontractors and suppliers (in an amount predetermined for each project) if they can or, if they can't, they must show that they made all possible "good faith efforts" to do so.

The requirement that the "goal" be met if at all possible deprives non-DBE subcontractors of work they would have otherwise received. Among other things, it

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bid specifications and "goals" if they were not necessary for remedial purposes, plaintiffs must show that there was a particular instance in which discretion was not properly exercised. It went on to hold that only contractors who could demonstrate that they were denied a contract because of the program's requirements as applied on a specific contract would have standing even to make such a challenge.

The Court of Appeals ignored the fact that, unless there is a showing of a factual basis for a "compelling interest", Florida may *not* grant to the Secretary the discretion to require implementation of race-conscious measures and any such grant of discretion may be challenged on its face. In fact, however, the use of race-conscious "goals" on the project on which Mr. Brooks' company lost a subcontract and on which Mr. Cone's company had to pay thousands of dollars more to comply is a sufficient example of the Secretary's unconstitutional failure properly to exercise his discretion.

also often increases the prime contractor's risks (since he is forced to subcontract with entities he might otherwise not choose and with whose quality of work he is not familiar and in which he does not have confidence, subjecting him to the possibility of penalties if the work is not completed in a timely or a satisfactory manner), increases his costs (because DBE firms often bid higher than their non-DBE competitors),[5] and decreases his profits (because he is often forced to subcontract work he would otherwise perform with his own workforce or with a lower priced non-DBE subcontractor).

The principal laws which are currently in force and which affect highway contractors in Florida in connection with the submission of their bids are FSA § 339.0805 (requiring an overall 10% utilization of DBEs in Florida DOT contracts), P.L. 100-17 (Surface Transportation and Uniform Relocation Assistance Act of 1987), section 106(c), and 15 U.S.C. § 637(d)(3)(C) (defining a DBE).

The federal statutes and regulations (*e.g.*, P.L. 100-17 and USDOT Order 4000.7A) do not operate directly on the contractors and subcontractors (since the federal government does not contract to build highways within the States); the requirements apply only to the "grantees" and "aid recipients" (*i.e.*, the States).[6] It is the States,

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[5] See, *e.g.*, plaintiff's exhibit 13, reflecting the petitioner Cone Corporation's increased costs in subcontracting with a DBE and the loss of that subcontract by petitioner O.B. Brooks & Sons.

[6] This, of course, is why these petitioners named no federal defendants. They have no claim against any federal entity.

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including the State of Florida, which require the contractors to set aside a percentage of the work included in their bids so that, overall, 10% of the highway construction funds will be spent with DBEs.

ARGUMENT – REASONS FOR ALLOWANCE OF THE WRIT

Two years have passed since this Court decided *Croson*. Since the Spring of 1989, petitioners know of no race-conscious program in public procurement or construction contracting which has been successfully and finally challenged on equal protection grounds. It is important for this Court to speak again on this question of vital public importance, to further define the constitutional standards to be applied and to emphasize the proper application of those standards to race-conscious bid specifications and "goals" imposed on contractors (such as the petitioners) by State, county, and local governments.

As to question 1 presented in this petition (*i.e.*, standing), the Court of Appeals' decision conflicts with prior decisions of this Court and of courts in other Circuits[7]

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It would be the FDOT which could bring a third-party claim against the federal agencies if it so desired, since it is the FDOT which contracts with the USDOT.

[7] *See, e.g., Michigan Road Builders v. Milliken*, 834 F.2d 583 (6th Cir., 1987), *aff'd*, 109 S.Ct. 1333 (1989), reaching the merits of the constitutional question but necessarily assuming, *sub silentio*, the existence of a "case" or "controversy". The Court

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and requires civil rights plaintiffs to bear unnecessary and improper burdens to demonstrate their standing to challenge unconstitutional governmental race-consciousness.[8] The Court of Appeals decision should be summarily reversed on this question.

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of Appeals for the Seventh Circuit also recently reached the merits of a case where the contractor-plaintiffs alleged effects similar to those which the Eleventh Circuit has now decreed are insufficient to confer standing. *See, Milwaukee County Pavers Ass'n v. Feidler*, 922 F.2d 419 (7th Cir., 1991). *See also, Contractors Ass'n v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa., 1990).

[8] The Eleventh Circuit appears reluctant to permit enforcement of orders in cases which give effect to this Court's reasoning in *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706 (1989). Since the *Croson* decision was handed down, the Court of Appeals has had four cases in addition to this one before it involving various DBE programs. It has managed to avoid finding for the plaintiffs in each one:

a. In *H.K. Porter Company, Inc. v. Metropolitan Dade County*, 109 S.Ct. 1333 (1989), this Court vacated the Court of Appeals decision (which had upheld the County's DBE program and a grant of summary judgment to the County) and remanded the case for reconsideration in light of *Croson*. Rather than doing so, the Court of Appeals remanded the case to the district court. The district court has since re-affirmed its grant of summary judgment to the County, citing *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S.Ct. 2997 (1990).

b. In *Northeastern Florida Chapter, AGC v. Jacksonville*, 896 F.2d 1283 (11th Cir., 1990), the Court of Appeals reversed the grant of a preliminary

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As to question 2 (*i.e.*, the necessity of a factual basis and the level of scrutiny to be applied), it presents an issue of considerable public importance which should be decided by this Court at this time. The question has, in at least two other cases,[9] been decided by the Courts of

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injunction because of a supposed want of a showing of irreparable injury.

c. In *Cone Corporation v. Hillsborough County*, 908 F.2d 908 (11th Cir., 1990), the Court of Appeals, before argument, vacated the district court's injunction and then, in its decision, practically limited the applicability of *Croson* to its facts, reversed a grant of summary judgment to the plaintiffs and remanded for trial.

d. In *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir., 1991), the Court of Appeals vacated the district court's order holding the program unconstitutional and remanded for evaluation under an "intermediate" level of scrutiny rather than "strict scrutiny", citing *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S.Ct. 2997 (1990).

[9] *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d. 752 (11th Cir., 1991); *Milwaukee County Pavers Ass'n v. Feidler*, 922 F.2d 419 (7th Cir., 1991). It is important to note that, in its *S.J. Groves* opinion, the Court of Appeals extended the applicability of this Court's decision in *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S.Ct. 2997 (1990), into the public contracting context despite Justice Stevens' explicit limitation in *Croson*:

> As I pointed out in my dissent in [*Wygant*], even if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking. *In the case of public*

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Appeals (including the Eleventh Circuit) in a way which conflicts with the expressed opinions of a majority of the Justices of this Court. A remand to the Court of Appeals for a further determination on this issue would be futile, and a waste of time and resources.

1. The Court of Appeals erred in denying standing to these petitioners.

Petitioners' standing to maintain this constitutional challenge was never tested by a motion to dismiss or for summary judgment in the district court. Petitioners, therefore, never had an opportunity to present fully their evidence to demonstrate the multitude of effects this program has had on them. Nevertheless, there is sufficient evidence in the record to demonstrate standing and to avoid dismissal.[10]

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contracting, however, if we disregard the past, there is not even an arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market.

Croson, 109 S.Ct., at 731 (Stevens, J., concurring) (emphasis added)

[10] It should be noted that, since entry of the district court's order, the Cone Corporation was the low bidder on at least one FDOT project (Job number 02000-3608, Federal Aid Project number MABRZ-0005(35)) which was not awarded to it because it failed to comply with the DBE program requirements. If this case had been remanded for further proceedings, rather than for dismissal, this evidence could be presented in the context of this litigation, and standing would be undisputed. Petitioners requested a modification of the Court of Appeals' opinion to permit such a remand, but that relief was denied.

The loss by Mr. Brooks' company of a specifically identified subcontract and the payment by Mr. Cone's company of thousands of dollars extra in order to hire a DBE subcontractor for that work – even if there were nothing else in the record – constitutes precisely the type of "demonstrable, particularized injury" which gives a plaintiff standing to mount a constitutional challenge.

There *was* more, however. Mr. Cone testified about the increased costs and risks to his business engendered by the implementation of Florida DOT's DBE program, preliminary injunction hearing transcript, pp.59-74; 79-83. Mr. Brooks testified, generally, about the way in which the volume of his business as a specialty subcontractor on FDOT contracts had decreased because of the program, preliminary injunction hearing transcript, pp.39-44; 54-57. This might not be sufficient to provide a basis for an award of damages (because the injury was not quantified), but it is certainly enough to demonstrate standing – " 'to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker v. Carr*, 269 U.S. 186, 204 . . . (1962)", *Cone Corp. v. FDOT*, 921 F.2d at 1203; App.34, to assure the Court that the issues are presented in a genuinely adversarial manner and that the suit is not merely hypothetical or seeking an advisory opinion. These petitioners were directly and significantly affected by the program's requirements.[11]

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[11] The Court of Appeals' opinion improperly dismisses this evidence as not being specific enough to give these

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Since it is undisputed (1) that the FDOT's unconstitutional program has been, is being, and will continue to be enforced, so that these petitioners must comply with its provisions to have their bids deemed "responsive", and (2) that such compliance has real economic and non-economic effects on these petitioners, they should have standing to attack the constitutional validity of the program on its face; that is, to challenge the lack of identified discrimination in the Florida construction contracting market which would permit implementation of a race-conscious program. That was the challenge they mounted.

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plaintiffs standing, *Cone Corp. v. FDOT*, 921 F.2d at 1209, fn.57; App.50. It glosses over the specific subcontract lost by O.B. Brooks and the specific increased costs to the Cone Corporation by (1) drawing an adverse inference and stating that there is no evidence that the Cone Corporation actually performed as the prime contractor on that project (although it was understood in the district court that the Cone Corporation did, in fact, win and perform that contract) and (2) holding, without evidence, that the other financial burdens imposed are simply those common to all contractors who are forced to comply with this unconstitutional program and are insufficient to confer standing.

As to the first point, if there were a factual question as to whether the Cone Corporation performed the contract for which it failed to hire Mr. Brooks' company, the more proper remedy would have been a remand to the district court for further findings, not dismissal. As to the second point, the Court of Appeals was simply wrong. As a matter of law, one does not lose standing to challenge unconstitutional action simply because all others similarly situated suffer similar burdens, so long as those burdens are, in and of themselves, sufficient to confer standing.

The petitioners alleged *not* that the program was otherwise constitutional and had been applied to a *particular* project in a manner that made it unconstitutional, but that – because there were no facts which could be used by FDOT to demonstrate that the program was aimed at remedying identified discrimination in the construction industry in Florida – the program's very existence and overall enforcement was unconstitutional.[12] The district court found exactly that and granted petitioners relief, declaring the statute unconstitutional on its face insofar as it applied to expenditures on state-funded projects.

The question on appeal, then, concerned only the facial challenge to the other aspect of the program – federally-funded projects. Since there is no evidence of identified discrimination in the construction industry in Florida, petitioners contended that any race-conscious program requirement imposed on them by FDOT, so that FDOT might receive federal monies, was unconstitutional on its face. Compliance with the program by the petitioners was required in the same way no matter whose money was being used to fund the projects.[13]

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[12] In other words, petitioners were not complaining that someone deviated from an otherwise constitutional procedure and applied some requirement in an unconstitutional manner in a particular instance, but that the very existence of the requirement was unconstitutional. Having shown that it *was* applied in at least one instance, petitioners were challenging its facial constitutionality (which then required respondents to demonstrate a factual justification for its implementation).

[13] The Court of Appeals' opinion limits those who have standing to challenge the program to only those who lost a project on which they were the low bidder:

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It is undisputed that the program has been, is being, and will continue to be enforced on projects involving

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> If section 339.0805 required the Secretary to institute set-asides and goals that were not lawful remedial responses to identified past or present racial discrimination in Florida, then the court could conclude that the plaintiffs might suffer a denial of equal protection – in a case where, but for the set-aside or goal, they would have been the successful bidder.
>
> *Cone Corp. v. FDOT*, 921 F.2d at 1207; App.42.

This ignores the burdens imposed on successful bidders and the costs and burdens imposed in even submitting a responsive bid – successful or not.

Further, the Court of Appeals held that where, as in this program, an administrative agency is given discretion, plaintiffs must demonstrate that the Secretary exercised his discretion in a *particular* instance in an unconstitutional manner – that is, that only an "as applied" challenge could ever be mounted against such a program, *ibid*. The point is, however, that there is *no* evidence that the Secretary *ever* exercised his discretion "to institute set-asides and goals *only where necessary* to remedy identified racial discrimination", *ibid*. (emphasis supplied); he used them *all the time*. That is why petitioners brought a facial challenge to the race-conscious requirements.

Because the FDOT had no factual basis for the "compelling interest" necessary to implement the program in the first place, each application of the program's requirements was unconstitutional racial discrimination and no showing of its unconstitutional application on any particular project is necessary. The Secretary continues to require contractors to comply with the unconstitutional race-conscious specifications and "goals". It is fairly inferable that he will continue to do so until told by a court that he may not.

federal funds. Petitioners should have standing to mount their attack on this aspect of the program, as well.

Any decision denying these petitioners standing to attack the program's constitutionality distorts the standing doctrine and turns it from its true purpose – assuring that there is a true "case or controversy" within the meaning of Article III – into an artificially created bar to the court house for civil rights plaintiffs.

> Standing to contest unconstitutional governmental action necessitates a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution." –
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> *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-52 (1970).

These petitioners have certainly "sustained or will sustain an injury" and they clearly have been "moved to present the issue 'in an adversary context and in a form historically viewed as capable of judicial resolution.' " The Court of Appeals' decision should be summarily reversed.

Even a cursory review of the cases – both civil rights and other constitutional challenges – reveals many in which plaintiffs who were affected far less directly, far less significantly than these petitioners, and who had alternative remedies available to them, were granted standing to mount constitutional challenges. In *Brown v. Board of Education*, 347 U.S. 483 (1954), for instance, there *were*, in fact, non-segregated schools available to the plaintiff's daughter and the separate school systems *were*

"substantially equal", 347 U.S., at 486, fn.1. Nevertheless, in order to reach the merits of the constitutional challenge, this Court held that Mr. Brown had standing. Where, under the Court of Appeals' theory of the law of standing, was there any individualized "injury" to *that* plaintiff?

The requirements for standing to contest the allegedly racially-discriminatory determination not to rezone a parcel of land were satisfied in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), by an individual who alleged that he would apply to live in the low-income housing project which *might* be built *if* the zoning were changed has standing. (*If* the zoning were found to be racially discriminatory [the issue being litigated] and *if* it were changed as MHDC requests and *if* MHDC builds the project then *if* Ransom [the individual plaintiff] applies, it *appears* that he would qualify and he *alleges* he would move in. *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977).) *That* plaintiff's connection with any then-existing, non-hypothetical "case or controversy" (it required four "ifs" and an inference) was clearly far more tenuous than that presented by these petitioners and his ability to "demonstrate a realistic danger of sustaining a direct injury as a result of the law's operation or enforcement" was far less than the ability of *these* petitioners to do so.

In *Pennell v. City of San Jose*, 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1151 (1988), the plaintiffs (a landlord and landlords' association) brought an action for declaratory

judgment and an injunction attacking the constitutionality of the city's rent control ordinance. Their grievance was specifically against a clause in the ordinance requiring a hearing in the event that a tenant objects to a rent increase and allowing the hearing officer to take into account the hardship of the tenant.[14] This Court held that the plaintiff association and the landlord *did* have standing "even though they did not allege that either [the association's members or the landlord plaintiff] had 'hardship tenants' who might trigger the Ordinance's hearing process, or that they have been or will be aggrieved by a hearing officer's determination that a certain proposed rent increase is unreasonable on the ground of tenant hardship." *Pennell*, 108 S.Ct. at 852. The Court found a sufficient threat of actual injury to satisfy the Article III requirement:

> Appellants alleged that their properties are subject to the Ordinance, and stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants." Thus, the likelihood of enforcement of the Ordinance, with the concomitant probability that a rent will be reduced below what the landlord would otherwise be able to obtain is a sufficient threat of actual injury to satisfy Art. III's requirement. . . .
>
> *Pennell*, 108 S.Ct. at 852.

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[14] The ordinance provided that a landlord may automatically raise annual rent of a tenant by as much as eight percent, but if the tenant objects, a special hearing is required to determine if the increase is "reasonable under the circumstances." The hearing officer is to consider among other things, the "hardship to the tenant." *Pennell*, 108 S.Ct. at 852.

Under the standards set out in *Pennell*, petitioners in this case have shown more than a "sufficient threat of actual injury to satisfy Art. III's requirement that a plaintiff who challenges a law must demonstrate a realistic danger of sustaining a direct injury as a result of the law's operation or enforcement." 485 S.Ct. at 4.

> Injury in fact . . . serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, see *Baker v. Carr*, 389 U.S. 186, a $5 fine and costs, see *McGowan v. Maryland*, 366 U.S. 420, and a $1.50 poll tax, *Harper v. Virginia Bd. of Education*, 383 U.S. 663.
>
> *United States v. SCRAP*, 412 U.S. 669 (1973).

In this case, the petitioners are the entities at whom the challenged program is directed. They are forced to expend time, effort and money to comply with its requirements and have a far more direct and immediate, and a far more substantial, interest in the program than many of the plaintiffs who have challenged other constitutional violations. Granting them standing serves the purposes of the doctrine by insuring that those with a stake in the litigation (as opposed to those having merely an abstract interest) are those who bring the challenge; denying them standing closes the court house door to those who would be most likely to present the issues in a clear, sharp, adversarial manner and to assist in the illumination of the facts so as to enable the Court to decide an important constitutional issue. The standing doctrine

should not be utilized to avoid difficult questions, but only to avoid deciding hypothetical ones.

The Court of Appeals' opinion places unnecessary obstacles in the path of any civil rights plaintiff and should be reversed.[15] Under the test the Court of Appeals has laid down, Oliver Brown would have had to make a "good faith effort" to obtain a "separate but equal" education for his daughter (and show why he couldn't simply enroll her in the unsegregated facility which was available) in Topeka before he could challenge the constitutionality of educational segregation.[16] Under the test laid down by the Court of Appeals, the landlord plaintiff in *Arlington Heights* would have been barred because his "injury" was too speculative and remote. Under the test laid down by the Court of Appeals, the plaintiff in *Baker v. Carr* would have no standing because he shared his disability and burden with all other voters similarly situated. The Court of Appeals' opinion engrafts undesirable and unnecessary limitations on standing to challenge unconstitutional governmental action, including (as here)

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[15] The Court of Appeals' draconian test for standing in this type of case stands in sharp contrast to its earlier pronouncements in more traditional civil rights cases. *See, e.g., Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1423 (11th Cir., 1984), where the Eleventh Circuit held that "irreparable injury may be presumed from the fact of discrimination . . . " and affirmed the entry of a preliminary injunction against a developer who managed an apartment complex which received federal subsidies. If there is irreparable injury, there is certainly standing.

[16] *Brown v. Board of Education*, 347 U.S. 483 (1954).

invidious racial and ethnic discrimination, which is aimed at a particular group and which affects each member of that group. The judgment of the Court of Appeals should be summarily reversed.

2. Before implementing a race-conscious program in public contracting, a State must show that such use is necessary to remedy discrimination in that market; even if it does so in order to obtain federal funds, its use of race-conscious measures must be supported by such a showing.

There is no question but that the FDOT's use of race-conscious bid specifications and "goals" on projects funded solely with State funds is unconstitutional. *That* portion of the district court's decision was not even appealed by respondents.

Once it is found that these petitioners have standing to challenge the FDOT's use of race-conscious bid specifications and "goals", this case presents squarely for decision the question framed by Justice Kennedy's conundrum ("The process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me . . . . ", *Croson*, 109 S.Ct. at 734). This case presents an unusually good opportunity[17] for this Court to decide the question.

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[17] The record is "clean" on this issue. The undisputed finding in the district court was that there was *no* finding – legislative, administrative or judicial, at any level of government – of discriminatory practices or effects in the Florida

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An analysis of the *Croson* opinions, in conjunction with the opinions rendered in *Fullilove v. Klutznick*, 448 U.S. 448 (1980),[18] reveals the fundamental flaw in the

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highway construction industry at which the use of the race-conscious bid specifications and "goals" were aimed. The program was, for this reason, found to be unconstitutional when State funds were used.

[18] It should be noted that, despite being often cited, *Fullilove* is *not* binding precedent. There was no majority opinion and, in fact, no plurality opinion. Even plurality opinions, however, are not binding precedent:

> . . . As the plurality opinion in MITE did not represent the views of a majority of the Court, . . . we are not bound by its reasoning.
>
> *CTS Corporation v. Dynamics Corporation of America, et al.*, 481 U.S. 69, 81, 107 S.Ct. 1637, 1645 (1987) (per Powell, J.)

The Eleventh Circuit has made the same point, in another discrimination case where it sought to read this Court's opinions very narrowly:

> We are aware that four members of the Supreme Court recently have indicated that the burden of proof on the absence of business necessity rests with the plaintiff. See *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___, 108 S.Ct. 2777, 2790, 101 L.Ed.2d 827 (1988). *A plurality opinion, however, is not binding precedent* . . . .
>
> *Powers v. Alabama Dept. of Education*, 854 F.2d 1285, 1292 fn.11 (11th Cir., 1988) (Judge Clark) (emphasis added)

lower court's reasoning. The district court failed to recognize that Congress' command that race-conscious measures be used *where necessary* implies that a determination of necessity must be made at some point for each market. No such determination has ever been made with regard to construction contracting in Florida. The command to determine "necessity" and implement a remedy if such necessity is found may be subject to only an "intermediate" level of scrutiny (and a less exacting examination of the factual foundation for it may be required) since it leaves for a later market-by-market determination the existence of such necessity.

The implementation of race-conscious measures by a State is, without regard to the source of the funds it is using, subject to "strict scrutiny" to determine whether any such necessity exists. *Fullilove* only permitted Congress to condition the grant of federal funds on an administrative, market-by-market determination that recipients were taking adequate action to eliminate discrimination and to require the use of race-conscious measures *if and only if* they were *necessary* in that market to eliminate discrimination.[19] *This* case requires a determination *not* of

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[19] Viewed this way, Pub.L. 100-17 is operating only to "induce voluntary action to assure compliance with existing . . . constitutional antidiscrimination provisions . . . . ", *Fullilove*, 448 U.S. at 483. If Pub.L. 100-17 is construed merely to condition the grant of federal funds on a State's willingness to take appropriate action when it can identify its "compelling interest" in doing so, then "strict scrutiny" of the federal statute is not required because the statute does not require – or permit – race-conscious measures when a "compelling interest" has not been demonstrated.

whether Congress could encourage the use of race-conscious programs to eliminate the effects of identified discrimination when such discrimination is shown to exist in a particular market but, rather, whether *Florida DOT* could implement such a program when there is *no evidence* of current identified discrimination or any current effects of identified discrimination.

In other words, *Fullilove* permits Congress to encourage States to utilize race-conscious measures where necessary to eliminate discrimination and its effects, but it is *Croson* which sets out the standards by which the existence of that necessity is to be measured.

The question is not whether (as phrased in *Fullilove*) Congress

> may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions
>
> or
>
> where Congress has authority to declare certain conduct unlawful, . . . [to] authorize and induce state action to avoid such conduct.

Congress may, of course, do *those* things. Rather, the question is whether the States, in order to secure federal funds, may use race-conscious measures when such use is *not* shown to be necessary "to assure compliance with existing federal . . . constitutional antidiscrimination provisions" and whether Congress has the power to permit them to do so in *that* circumstance.

It is fundamental that the national government cannot require or coerce or even permit the States to do that which is in contravention of the Constitution. Therefore,

unless FDOT could demonstrate its interest in remedying the effects of identified discrimination in this market (and it could not do so) and had narrowly tailored any program intended to do so (and it did not), FDOT was constitutionally prohibited from using race as a criterion for awarding contracts, the federal government could not compel such action and the federal government was prohibited from conditioning the grant of funds on such action.[20]

As this Court has said, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity"[21] if state and local governments are relieved of the requirement that they make factual findings of local effects of identified discrimination; so, too, would the constraints of the Fifth Amendment be "rendered a nullity" if Congress were free to impose, or permit, nationwide race-conscious remedies because some ill-defined effects of societal discrimination existed in some areas.[22]

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[20] Compare, *e.g.*, *South Dakota v. Dole*, 107 S.Ct. 2793, 2798 (1986):

> . . . a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress' broad spending power.

[21] *Croson*, 109 S.Ct., at 727.

[22] Since there is no evidence that Florida, or the defendants, or Congress, or any federal agency knows of any current effects of identified discrimination being felt in the construction industry in Florida, it is incumbent upon FDOT to seek a waiver from any federally-imposed requirement. A State

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CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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cannot actively participate in racial discrimination when it cannot substantiate a compelling interest in doing so. Getting its hands on federal funds can hardly be considered a "compelling interest".

Appendix

1. Opinion of the Court of Appeals for the Eleventh Circuit, January 8, 1991..... App. 1
2. Order of the District Court, August 1, 1989..... App. 53
3. Report and Recommendation of the Magistrate..... App. 55
4. Constitutional Provisions, Statutes and Regulations Involved..... App. 105

The CONE CORPORATION, C.H. Barco Contracting Co., Asphalt Pavers, Inc., etc., et al., Plaintiffs-Appellants,

v.

FLORIDA DEPARTMENT OF TRANSPORTATION, Ben G. Watts, Secretary of the Department of Transportation; and Bob Martinez, Governor of the State of Florida, Defendants-Appellees.

No. 89-3694.

United States Court of Appeals,
Eleventh Circuit.

Jan. 8, 1991.

Highway construction contractors filed suit, seeking a declaration that the set-aside and minority business program for contracts awarded by the Florida Department of Transportation (FDOT) violated equal protection. The United States District Court for the Northern District of Florida, No. 88-40042-WS, William Stafford, Chief Judge, declared the governing statute unconstitutional for highway construction projects that received no federal funds, but upheld the statute to the extent that it served as a vehicle for obtaining federal highway funds. Contractors appealed. The Court of Appeals, Tjoflat, Chief Judge, held that the contractors failed to show that they had been denied any contracts on basis of their race or that the operation of the Florida statute would necessarily result in an equal protection violation and, therefore, the contractors did not have Article III standing.

Vacated and remanded.

Appeal from the United States District Court for the Northern District of Florida.

Before TJOFLAT, Chief Judge, ANDERSON and CLARK, Circuit Judges.

TJOFLAT, Chief Judge:

This is an appeal from an order of the district court declaring unconstitutional on fourteenth amendment equal protection grounds a Florida Statute, Fla.Stat. § 339.0805 (1989), and the administrative regulations promulgated thereunder. Fla.Admin.Code Ann. ch. 14-78 (1989), that created a set-aside and minority business participation program for contracts awarded by Florida's Secretary of Transportation (the Secretary), the head of the Florida Department of Transportation (FDOT).[1] In its order, the district court[2] noted that this statute and the regulations had been modeled after a nearly identical federal statute, the Surface Transportation and Uniform

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[1] We originally heard the case as an interlocutory appeal by the plaintiffs from the district court's order refusing to issue a preliminary injunction against the implementation of section 339.0805 and the regulations thereunder. At oral argument, both parties stated that the case was ready for a final decision by the district court. In the interests of judicial economy and to avoid a possible provisional decision by this court, we remanded the case to the district court for the entry of final judgment while retaining jurisdiction of the appeal. *Cone Corp. v. Florida Dep't of Transp.*, No. 89-3694 (11th Cir. Nov. 16, 1989) (per curiam) (unpublished opinion).

[2] The district court adopted, without modification, the report and recommendation of the magistrate, to whom it had referred the plaintiff's application for preliminary injunctive relief and their motion for summary judgment, as its final order. All references herein to the findings of fact and conclusions of law of the district court are therefore to the findings and conclusions of the magistrate.

Relocation Assistance Act of 1987 (STURAA), Pub.L. No. 100-17, § 106(c), 101 Stat. 132, 145, and the regulations promulgated thereunder, 49 C.F.R. §§ 23.61-69 (1989), which require a state to have a set-aside and minority business participation program if it wants to receive federal funds for highway construction projects, and that the federal statute contained no equal protection infirmity under the fifth amendment. Concluding that the Florida statute and regulations are "the end result of, and thus necessarily a part of," a valid federal program, the court upheld the Florida statute to the extent that it serves as a vehicle for obtaining federal highway construction funds. In sum, the district court concluded that Fla.Stat. § 339.0805 and the regulations promulgated thereunder are, at once, both constitutional and unconstitutional on their face – depending on the source of the funds that the Secretary may be using to implement the program created by the statute and regulations.

We vacate the district court's order and direct the district court, on receipt of our mandate, to dismiss the case without prejudice.[3] We do so without reaching the merits because the plaintiffs, all of whom are engaged in the highway construction business in Florida, lack standing to pursue their claims.

We organize the opinion as follows. In part I, we summarize in subpart A the provisions of the federal

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[3] Because we do not decide this appeal on the merits, we must direct the district court to dismiss the case without prejudice. *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 604 n. 16 (11th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986).

set-aside and minority business participation program and, in subpart B, its Florida counterpart. In part II, we set forth the plaintiffs' claims, as presented in their amended complaint, and the district court's dispositive order. In part III, we determine that the plaintiffs lack standing.

I.

A.

Congress authorized the appropriation of federal funds to aid states in highway construction under STURAA.[4] STURAA and the federal regulations thereunder direct that states that want to receive federal funds for highway construction must have set-aside and minority business participation programs to ensure that minority businesses have the maximum opportunity to compete for the contracts involving federal funds. Section 106(c)(1) of STURAA provides:

> *Except to the extent that the Secretary determines otherwise,* not less than 10 per centum of the amounts authorized to be appropriated under [STURAA and the prior highway aid appropriations act, the Surface Transportation Assistance Act of 1982] after the date of the enactment of

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[4] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. No. 100-17, 101 Stat. 132; *see also* 23 U.S.C. §§ 101-158 (1988). The Federal Highway Administration (FHWA) of the United States Department of Transportation (USDOT) grants funds to the states for specific highway construction programs and projects, 23 U.S.C. §§ 105-106, 110; it provides up to 75% – generally the majority – of the funds needed for such projects, with the states providing the remainder, *id.* § 120.

> this Act shall be expended with small businesses owned and controlled by socially and economically disadvantaged individuals.

Pub.L. No. 100-17, § 106(c)(1), 101 Stat. at 145 (emphasis added).[5]

A small business owned and controlled by a socially and economically disadvantaged individual, or a disadvantaged business enterprise (DBE),[6] 49 C.F.R. § 23.62, is, almost invariably, a small business owned or controlled by a member of a minority group or a woman. Women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans are presumptively socially and economically disadvantaged. *Id.*[7]

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[5] This provision is nearly identical to section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA), Pub.L. No. 97-424, § 105(f), 96 Stat. 2097, 2100. STAA authorized the appropriation of federal highway construction funds through 1986, *id.* § 105(a), 96 Stat. at 2099; STURAA extended this funding through 1992, Pub.L. No. 100-17, § 106(a), 101 Stat. at 144-45. Regulations promulgated under section 105(f) of STAA and section 106(c) of STURAA are codified at 49 C.F.R. pt. 23(D) (1989).

[6] The federal regulations use the term "disadvantaged business"; the nearly identical Florida regulations use the term "disadvantaged business enterprise." The abbreviation DBE will be used for both throughout this opinion.

[7] The presumption that members of these minority groups are socially and economically disadvantaged is rebuttable. 49 C.F.R. § 23.62. States that want federal funds must implement a procedure by which third parties may challenge the disadvantaged status of any individual presumed to be disadvantaged. *Id.* § 23.69. Florida provides such a challenge procedure in Fla.Admin.Code Ann. r. 14-78.007(7).

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This statute and the regulations thereunder impose three requirements on states that want to receive federal highway funds. First, each state must set and meet an annual goal, which the Federal Highway Administration (FHWA) of the United States Department of Transportation (USDOT) must approve, for DBE participation in highway construction projects funded with federal grants. *Id.* §§ 23.61, .64, .66.[8] The FHWA always approves a goal of ten percent or more. *Id.* § 23.66(a). It *may* approve a goal of less than ten percent if the state justifies the goal by showing that the state is making all appropriate efforts to increase DBE participation in federal aid contracts, and, despite these efforts, a goal of less than ten percent represents a reasonable expectation for DBE participation given the availability of DBEs in the state. *Id.* § 23.66(b).[9] Florida each year has set and met a DBE goal of ten percent.

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States also may determine, on an ad hoc basis, that individuals outside the listed groups are socially and economically disadvantaged. 49 C.F.R. § 23.62.

[8] Although the regulations state that all "recipients" of federal highway construction funds (including private parties like contractors that receive such funds indirectly through contracts with direct recipients like states, 49 C.F.R. § 23.5) should set and meet a DBE participation goal of at least 10%, *id.* § 23.61(b), only certain recipients, such as states, must submit this overall goal to the FHWA each year and receive FHWA approval, *id.* §§ 23.41(a), .64(a), .66. Florida must establish an MBE program under section 23.41(a)(3)(i), as an applicant for federal highway construction funds; it therefore must submit an overall goal and receive FHWA approval.

[9] When it submits a goal of less than 10%, the state must (1) provide a justification explaining why the goal is low, (2)

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Second, each state that wants to receive federal highway funds must agree *not to discriminate* on the basis of race, sex, color, or national origin in the award of federally assisted contracts, *id.* §§ 23.7, .41(a), .43(a)(2), while at the same time making every reasonable and necessary effort to insure that minority businesses have the maximum opportunity to compete for and perform contracts, *id.* §§ 23.1(a), .41(a), .43(a)(1). These requirements become part of every initial financial assistance agreement between the state and the federal government under which the state receives federal funds and every subsequent contract between the state and any contractor that involves the expenditure of federal funds. *Id.* § 23.43(a).

Third, each state that wants to receive federal highway funds must develop a minority business enterprise (MBE)[10] program, which the FHWA must approve before

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obtain the signature or concurrence of the governor, and (3) consult with minority community resources to assess the availability of DBEs and the adequacy of the state's efforts to increase DBE participation. *Id.* § 23.64(e). The justification must include information on (1) the state's efforts to locate DBEs, (2) the state's efforts to inform DBEs of contracting opportunities, (3) the state's initiatives to encourage and develop DBEs, (4) legal and other barriers to 10% DBE participation and the state's efforts to overcome the barriers, (5) the availability of DBEs, (6) the size and characteristics of the minority population in the state, and (7) a summary of the state's efforts to increase DBE participation through consultations with community resources. *Id.* § 23.65.

[10] Subpart C of 49 C.F.R. part 23, which requires states to implement MBE programs to receive highway construction funds but also covers many other types of federal aid, refers to

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it will grant any highway aid funds, and which becomes part of every financial assistance agreement between the state and the FHWA. *Id.* §§ 23.41(a)(3)(i), (b)(c), .43(b). To receive FHWA approval, the state's MBE program must include, among other features,[11] a set-aside procedure

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minority business enterprises (MBEs) throughout; when its is imposing requirements limited to recipients of highway aid under STURAA and STAA, it refers to disadvantaged business enterprises (DBEs).

The definition of an MBE is almost identical to the definition of a DBE, and the terms are interchangeable for the purposes of this opinion. An MBE is a small business 51% owned and controlled by a member of a minority group or a woman. *Id.* § 23.5. Minorities include Blacks, Hispanics, Portuguese, Asian Americans, American Indians, Alaskan Natives, and other groups or individuals found to be disadvantaged under section 2[8](a) of the Small Business Act, 15 U.S.C. § 637 (1988). 49 C.F.R. § 23.5.

[11] Required components of an MBE program include: (1) a policy statement advocating maximum MBE participation; (2) designation of an MBE liaison officer and staff; (3) development of procedures insuring that MBEs have an equitable opportunity to compete, including affirmative action techniques such as providing assistance in bonding and financing and providing training on contracting procedures; (4) encouraging the use of banks controlled by minorities or women; (5) providing an MBE directory; (6) setting up procedures to certify the eligibility of MBEs, including specific certification procedures in states receiving highway construction funds under STURAA; (7) *setting up percentage goals for MBE or DBE participation, including both overall goals and specific contract goals which each contractor must meet or demonstrate good faith efforts to meet;* (8) insuring that contractors make good faith efforts to meet MBE contract goals; (9) providing a description of the methods

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that limits competition for certain contracts to MBE and DBE prime contractors, *id.* § 23.45(k), and a minority business participation procedure under which the state requires each prime contractor that enters into a contract involving federal funds to meet (or demonstrate a good faith effort to meet) a goal, set by the state, for DBE subcontractor participation in that contract, *id.* § 23.45(g)(ii).[12]

A state that fails to comply with any of these three requirements may lose all or part of its federal highway funds. *Id.* § 23.68(b), (e)(1); *id.* § 23.43(b)-(c); 23 C.F.R.

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by which the state will require contractors and subcontractors to comply with MBE requirements; and (10) *implementing set-asides reserving contracts to MBE bidders when three or more are qualified and state or local law permits.* 49 C.F.R. § 23.45.

[12] To ensure that prime contractors on projects funded with federal funds make good faith efforts to meet DBE subcontractor participation goals, the federal regulation mandates that the state either require the contractor to include in its bid the names, addresses, proposed work (and dollar amount thereof) of each MBE subcontractor or prescribe other requirements of equal or greater effectiveness. *Id.* § 23.45(h)(1)-(2). States may consider the following factors, among others, to determine whether a contractor that has failed to meet a goal has made a good faith effort: (1) attendance at presolicitation MBE meetings; (2) advertisement of subcontracting opportunities; (3) timely notice of solicitation to MBEs; (4) followup on initial solicitation of MBEs; (5) selection of suitable portions of the work for MBE participation; (6) provision of adequate information to MBEs about the plans and specifications of the contract; (7) good faith negotiations with MBEs; (8) assistance with bonding, insurance, and credit to MBEs; and (9) use of minority community resources to obtain MBE participation. *Id.* § 23.45 app. A.

§ 1.36 (1990). Two provisions of the federal regulations, however, allow states to escape certain of these requirements and still receive federal funds. First, as discussed above, the FHWA may approve an overall DBE participation goal of less than ten percent if the state justifies the goal. 49 C.F.R. § 23.66(b). Second, in "appropriate circumstances," a state may receive federal funds even if it does not have an MBE program or deviates from the MBE program requirements. *Id.* § 23.41(f).[13] An additional provision allows individual third parties within the states to challenge the presumption that a member of a minority group or a woman is socially and economically disadvantaged. *Id.* § 23.69. Theoretically, a state also may avoid the federal requirements by choosing not to apply for federal funds.

Florida law specifically authorizes the Florida Secretary of Transportation to obtain federal highway funds and "to make all contracts and do all things necessary to cooperate with the United States Government in the construction of roads under the provisions of such Acts of Congress and all amendments thereto." Fla.Stat. § 339.05. As the district court noted, the Florida set-aside and minority goal participation program seems to be based on

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[13] The head of the FHWA may exempt states or allow them to deviate from the MBE program requirements only in "exceptional" circumstances and only if the United States Secretary of Transportation concurs; the program with the modifications requested must still substantially comply with the requirements. If the state claims that it is forbidden by state law from including a particular provision in its program, but nonetheless should receive federal funds, it must cite the state law. *Id.* § 23.41(f).

the federal scheme, and most likely was enacted in part to allow Florida to receive federal aid highway funds, although the Florida program never explicitly states that it was instituted in response to the federal scheme. The language of the Florida statute and regulations echoes the federal scheme, and the Florida program contains several references to federal definitions and programs. *See, e.g., id.* § 339.0805 (reference to DBEs as defined by STURAA).

This summary of the federal DBE program, however, is useful only as background material for a consideration of the Florida program and as evidence of the manner in which Florida's Secretary of Transportation might be expected to act in order to receive federal funds. The merits of the federal program are not before us; the plaintiffs have sued no federal defendant and have alleged no way in which the Florida statute or regulations could be considered "a part of" the federal statutory scheme, as the district court found, so that the constitutional validity of that scheme could save the other when federal aid is being used. We recognize, of course, that if the state of Florida were to lose this federal aid because of its failure to meet the federal DBE and MBE requirements, the consequences would be heavy. In fiscal year 1987-88, the federal highway aid funds received by the FDOT and awarded to contractors were $278.4 million, from a total FDOT highway construction award of $436.2 million. In fiscal year 1988-89 to March 28, 1989, the Secretary awarded $293.5 million in federal aid in a total award of $377.6 million.

B.

The Florida statute modeled on STURAA, section 339.0805, reads:

> (1)(a) *Except to the extent that the [Secretary] determines otherwise,* not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987.
>
> (b) In fulfilling this mandate, the department shall utilize every means available to it, including, but not limited to, *goals* and *set-asides* for competitive bidding and contracting only by, between, and among those firms which are certified by the department as socially and economically disadvantaged business enterprises and which are prequalified as may be appropriate. . . .

Fla.Stat. § 339.0805 (emphasis added). This statute governs FDOT highway construction contracts because the Secretary, through the FDOT, is authorized to expend funds from the State Transportation Trust Fund[14] to construct and maintain state highway systems and to match any federal funds granted to state highway systems. *Id.* § 339.08. The expenditures for the highway

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[14] The State Transportation Trust Fund, which is maintained by the Comptroller within the State Treasury, Fla.Stat. § 339.081(1), contains revenues from the Florida gas tax, *Id.*; funds from the sale, lease, or conveyance of property by the FDOT, *id.* § 339.04; and other funds accruing to the FDOT that are not required by law to be maintained in a separate trust, *id.* § 339.081(1).

construction contracts at issue in this case, however, are only one type of expenditure from the Fund among many authorized by the statute, as the Fund covers all aspects of the state transportation system.[15]

Pursuant to the authority granted to him in Fla.Stat. § 334.044(2), the Secretary has promulgated regulations to implement section 339.0805 in Fla.Admin.Code Ann. ch. 14-78. These regulations provide definitions and allow set-asides and minority participation goals in certain circumstances to meet the ten percent goal of section 339.0805. The Florida definition of a small business owned and controlled by a socially and economically disadvantaged individual, or a disadvantaged business enterprise (DBE),[16] is almost identical to the federal definition. A DBE is a small business that is fifty-one percent owned or controlled by a socially and economically disadvantaged individual. *Id.* r. 14-78.002(2)-(3). Women, Black Americans, Hispanic Americans, Native Americans,

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[15] The money contained in the Fund may be used to pay FDOT administrative expenses; to construct and maintain the state highway system; to match federal funds allocated to the state, city, and county highway systems; to pay for public transportation systems within the state; to reimburse cities or counties for funds expended on the state highway system; to finance economic development transportation projects; to match any federal funds allocated for any purpose, *id.* § 339.08; to provide rodent control, relocation assistance, and moving costs to the extent required by federal law on federal-aid projects; and to provide relocation assistance and moving costs on projects not involving federal aid, *id.* § 339.09(2)-(3).

[16] Florida also has a minority business enterprise (MBE) program for other state and local contracts, Fla.Stat. §§ 287.093, .094-.0947, 288.701-.714, which is not at issue in this case.

Asian-Pacific Americans, and Asian-Indian Americans are rebuttably presumed to be socially and economically disadvantaged. *Id.* rr. 14-78.002(1), .005(7)(b)(1).[17]

The regulations mandate that the Secretary, through the FDOT, must set an annual overall goal for DBE participation in FDOT expenditures in order to insure that small businesses owned by socially and economically disadvantaged individuals have the maximum opportunity to participate in FDOT contracts. *Id.* rr. 14-78.001, .003(1).[18] The Secretary's overall goal for the past several

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[17] The Secretary certifies minority- and female-owned business as DBEs, and provides a list of certified DBEs to contractors. Fla.Admin.Code Ann. r. 14-78.005. The Secretary may suspend or revoke the DBE certification of a business for several reasons, including the failure of the DBE to fulfill its contractual obligations with contractors. *Id.* r. 14-78.008.

In addition to the presumptively disadvantaged groups, individuals already certified as socially and economically disadvantaged under section 2[8](a) of the federal Small Business Act, 15 U.S.C. § 637, and implementing regulations are also disadvantaged under the Florida program. Fla.Admin.Code Ann. rr. 14-78.002(1), .005(7)(b)(2).

The regulation also would allow an individual not within one of the presumptively disadvantaged groups to achieve DBE status if he proves social and economic disadvantage. *Cf.* 49 C.F.R. § 23.62. Wisconsin, for example, has certified a white male disabled Vietnam veteran as a disadvantaged individual. *Milwaukee County Pavers Ass'n v. Fiedler*, 731 F.Supp. 1395, 1402 (W.D.Wis.1990). The Secretary, however, in practice denies certification to any person not within the listed groups, although a person denied certification may appeal the decision.

[18] Factors considered in setting this overall goal include the number and type of contracts the Secretary awards, the number of DBEs available, and the past experience of the Secretary in meeting goals. Fla.Admin.Code Ann. r. 14-78.003(1)(a)-(c).

years has been to achieve ten percent DBE participation, although presumably he could set a lower goal under the "except to the extent that the [Secretary] determines otherwise" language of section 339.0805.

To ensure that he meets this overall goal – that is, that enough DBEs participate in contracts he awards – the Secretary may use two procedures: a set-aside or a DBE subcontractor participation goal. Under a set-aside, the Secretary allows *only* DBE prime contractors to bid on certain contracts, excluding nonDBE firms from the bidding process altogether. *Id.* r. 14-78.003(2)(a).[19] Under a DBE participation goal, the Secretary requires the prime contractor who wins a specific contract to subcontract a certain percentage of that contract to DBE subcontractors. *Id.* r. 14-78.003(2)(b).[20] The Secretary, in the specifications of the contract, states that DBE subcontractors must perform a certain percentage of the entire dollar amount of the contract, but does *not* himself require that certain subcontracts be reserved for DBEs.[21] The choice of which

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[19] The Secretary may only implement a set-aside if at least three qualified DBE prime contractors are available to bid on the project. *Id.* r. 14-78.003(2)(a)(2).

[20] A DBE prime contractor that is the low bidder on a contract containing a DBE goal is not required to meet the subcontracting goal, as its participation as prime contractor allows the entire amount of the contract to be counted toward the overall DBE goal. *Id.* r. 14-78.003(2)(b)(4).

[21] The Secretary sets goals for DBE subcontractor participation on a contract-by-contract basis, considering the type of work to be let, the subcontracting opportunities in the contract, the value of the contract, and the number of certified DBEs available to perform the work. *Id.* r. 14-78.003(2)(b)(1). The DBE

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subcontracts will be awarded to DBEs is thus left to each individual prime contractor.[22] Although DBE goals on

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goals are limited to 50% of the identified potential for DBE participation for contracts for $1 million or less, and to 75% of the identified potential for DBE participation for contracts greater than $1 million. *Id.* r. 14.003(2)(b)(2). Thus, if the Secretary awards a $1 million contract and he determines that the total potential for DBE subcontracts in that contract is 20% (or $200,000), he may set a goal of 10% (or $100,000) for DBE participation.

[22] For example, the Secretary might announce bidding for a $1 million contract, and might specify that a DBE must perform 10%, or $100,000, of that contract. The general contractor, not the Secretary, then decides to award a subcontract for grassing and sodding to a DBE and to contract with a DBE for the delivery of gravel in order to meet this goal.

To meet its DBE goals on a contract, a prime contractor is allowed to include such items as the full amount of a DBE subcontract on which the DBE itself has subcontracted 49% of the work (even to nonDBEs); certain expenditures for materials and supplies to DBE suppliers and manufacturers; fees or commissions for professional, technical, consulting, or managerial services; expenditures for delivery of materials and supplies to the job site; and fees or commissions charged for supplying bonds or insurance required by the contract. *Id.* r. 14-78.003(2)(b)(6). The test to determine whether expenditures to DBEs may be counted towards the goal is whether the DBE has performed a commercially useful function in the contract, evaluated in light of factors such as the amount of work subcontracted and normal industry practices. *Id.* r. 14-78.003(2)(b)(6)(c). A DBE meets this standard if it actually performs and manages 51% of the subcontract, *Id.*, and it may subcontract up to 49% of the work "consistent with normal industry practices," *id.* r. 14-78.003(2)(b)(6)(d). If a DBE subcontractor is unable to perform successfully, the prime contractor must make a good faith effort to obtain a replacement DBE. *Id.* r. 14-78.003(2)(b)(5).

some projects are set at more than ten percent, many contracts have no requirement of DBE participation. The lowest bidder to meet the DBE goal generally receives the contract, although a low bidder that fails to meet the goal still may get the contract by demonstrating that it has made a good faith effort to include DBEs. *Id.* r. 14-78.003(2)(b)(3); *see infra* slip opinion at 1406, at ___ & note 26.

NonDBE *prime* contractors may be affected in two ways by the program. They might be excluded from bidding altogether if a contract is set aside for DBEs, or they might be required to meet or demonstrate a good faith effort to meet a DBE subcontractor participation goal if they choose to bid on a contract that includes such a goal in its specifications. In addition, the regulations impose a third requirement on prime contractors: each must develop a DBE program, which the Secretary must approve before he will award any contracts to that contractor. *Id.* r. 14-78.003(4)(b).[23] A nonDBE *sub*contractor might be affected by only one aspect of the program: a prime contractor might accept a DBE bid for a subcontract rather than the lower bid of the nonDBE subcontractor in order to meet a DBE goal.

An individual prime or subcontractor that believes that a DBE set-aside or goal is unfair or unwarranted on

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[23] The DBE program becomes part of every contract between the contractor and the Secretary, and must include, among other components, the designation of a liaison officer to aid in the solicitation of DBE subcontractor bids and to assist DBEs in obtaining bonding, financing, and technical assistance, and the development of a record-keeping system to monitor the contractor's DBE efforts. *Id.* r. 14-78.003(4).

equal protection grounds and that may be unable to obtain a contract because it cannot meet the program requirements, however, has several administrative or judicial methods, integral to the program, to alert the Secretary to a possible equal protection violation and allow him to apply the program provisions in a constitutional manner by eliminating goals and set-asides that are not lawful remedial responses to past or present racial discrimination in the state of Florida.

First, the regulations provide that any third party, including a prime or subcontractor,[24] may challenge the socially and economically disadvantaged status of any individual who is presumed to be socially and economically disadvantaged because he or she is a member of a minority group or a woman. *Id.*, r. 14-78.007(7).[25] Thus, a contractor presumably could obtain an administrative ruling that Eskimos and Aleuts, for instance, who are presumptively disadvantaged as Native Americans, *id.* r. 14-78.002(1)(d), are nevertheless not disadvantaged for highway construction contracts awarded in Florida. A subcontractor that feels that it has been discriminated against by the award of a subcontract to a specific DBE firm could use this challenge procedure to cause that firm

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[24] The language of the rule, which permits a challenge by any third party, is very broad. For the purposes of this opinion, we focus on a challenge that might be brought by a contractor in an effort to prevent unlawful discrimination against it.

[25] No third party, however, may challenge the disadvantaged status of an individual already certified as socially and economically disadvantaged under section 2[8](a) of the federal Small Business Act, 15 U.S.C. § 637. Fla.Admin.Code Ann. r. 14-78.007(7).

to lose its DBE status. Similarly, a prime contractor that feels that the award of a set-aside contract to a DBE prime is discriminatory might challenge the disadvantaged status of the minority prime contractor.

Second, a prime contractor that may be unable to obtain the award of a contract because it cannot meet the DBE goal for that contract may demonstrate to the Secretary at the time it submits its bid that it has made a good faith effort to meet the goal and that the Secretary therefore should consider its bid.[26] If the Secretary is not

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[26] The Secretary will consider a bid that does not meet the DBE goal if the bidder, considering all relevant circumstances, "could not meet, despite its good faith efforts," the goal set for DBE participation. Fla.Admin.Cod Ann. r. 14-78.003(2)(b)(3). In evaluating whether the prime contractor has made a good faith effort to meet the DBE goal, the Secretary considers factors including, but not limited to, (1) whether the bidder contacted all certified DBEs in the area who perform the type of work the bidder intends to subcontract; (2) whether the bidder selected "economically feasible" portions of the contract for subcontracting; (3) whether the bidder provided assistance in reviewing the plans and specifications of the contract to interested DBEs; (4) whether other bidders met the DBE goal; (5) whether the bidder either submitted all quotations from DBEs or provided an explanation of why the bidder will not use the DBE who submitted a quotation; (6) whether the bidder assisted interested DBEs in obtaining bonding, credit, or insurance; (7) whether the solicited DBEs had the capability to perform the work the bidder attempted to subcontract; (8) whether the bidder's efforts, considering all relevant circumstances, "could not reasonably be expected" to produce enough DBE participation to meet the goal; and (9) whether the bidder has used DBEs on other contracts within the past six months. *Id.* r. 14-78.003(2)(b)(3)(c). To demonstrate its good faith efforts, the bidder must include in its initial bid submission sufficient information concerning its failure to meet the DBE goal. *Id.* r. 14-78.003(2)(b)(3)(a)(v).

satisfied that the contractor has made a good faith effort to meet the DBE goal and awards the contract to someone else, the contractor may seek immediate administrative review of the award, Fla.Admin.Code Ann. ch. 14-25 (1986), and may appeal a final agency decision in the Florida courts, *see C.H. Barco Contracting Co. v. State, Dep't of Transp.*, 483 So.2d 796 (Fla.Dist.Ct.App.1986). If the contractor demonstrates to the satisfaction of the Secretary (or the courts) that it has made a good faith effort to obtain DBE participation, its bid will be considered. If its bid is the lowest, it will receive the contract.

Third, a prime contractor who is "adversely affected" by a bid solicitation or award may file a protest, which generally suspends the bid solicitation process or award until a final agency resolution of the matter. Fla.Stat. §§ 120.53(5), 337.11(3)(b); Fla.Admin.Code Ann. ch. 14-25.[27] Although the regulation does not provide a

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[27] Only those contractors that are certified by the Secretary as qualified to bid on a contract may file a protest to the solicitation or award of that contract. Fla.Stat. § 337.11(3)(d); *id.* § 337.14 (providing that contractors bidding for contracts over $250,000 must be certified). This protest procedure thus is available only to the prime contractor plaintiffs, not the subcontractors.

The Secretary must announce his decision either to award a contract to a specific bidder or to reject all bids, *id.* § 337.11(3)(a), and a contractor "adversely affected" by the proposed solicitation or award must file a written protest and post a bond of up to $5000, *id.* § 337.11(3)(b); Fla.Admin.Code Ann. rr. 14-25.022(3), .024.

After a protest is filed and the solicitation or award of bids is suspended, the Secretary and the protester have seven days

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definition of "adversely affected," the Florida courts have held that a contractor may challenge a DBE set-aside or goal on equal protection grounds in an administrative protest to a bid solicitation or award. *See Cone Corp. v. State, Dep't of Transp.*, 556 So.2d 530, 531 (Fla.Dist.Ct.-App.1990) (a bidder that had not raised an equal protection challenge to a DBE goal in a bid protest waived its right to challenge the goal on constitutional grounds). *See generally Key Haven Associated Enters. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153, 157 (Fla.1982) (a party proceeding under Fla.Stat. § 120.57 and direct judicial appeal from agency action thereunder may raise constitutional challenges to the facial validity of a statute, the facial validity of an agency regulation implementing the statute, or the constitutionality of the agency's application of the statute or regulation).[28] The

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in which to reach a mutual agreement resolving the problem. *Id.* r. 14.25.026(1). If the matter is not resolved, the Secretary or his designee must conduct a hearing pursuant to Fla.Stat. § 120.57 and Fla.Admin.Code Ann. ch. 14-6 (1986), *id.* r. 14-25.026(2)-(3), and must issue an order resolving the matter, *id.* rr. 14-6.030, .031.

Although generally the filing of a protest will suspend the bid solicitation or award process, the Secretary may continue the process while a protest is pending if he shows that unless the process continues without delay, (1) an immediate and serious danger to public health, safety, or welfare will exist, Fla.Stat. § 120.53(5)(c); Fla.Admin.Code Ann. r. 14.25.025(1); or (2) the state will suffer a substantial loss of funding. Fla.Stat. § 337.11(3)(c).

[28] An agency may not declare a statute unconstitutional on its face in an administrative proceeding, but a party may

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relief that a contractor that successfully challenges a DBE set-aside or goal in an administrative protest procedure will receive is an order that the set-aside or goal not be instituted for the contract or an order that the contract be awarded to the party who brought the challenge.[29]

Fourth, either a prime or a subcontractor may file an equal protection challenge to the solicitation or award of a contract containing a DBE set-aside or goal in a Florida state court. A subcontractor, because it may not file an administrative protest to a solicitation or award, *see supra* note 27, may go directly to Florida state court and raise all of its claims without exhausting administrative remedies. *See Junco v. State Bd. of Accountancy*, 390 So.2d

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complete the administrative process and then challenge the facial constitutionality of the statute on direct appeal from the final agency action to a Florida district court of appeal. *Key Haven*, 427 So.2d at 157 (citing *Department of Revenue v. Young Am. Builders*, 330 So.2d 864 (Fla.Dist.Ct.App.1976)).

[29] In *Capeletti Bros. v. Department of Transp.*, 499 So.2d 855, 857 (Fla.Dist.Ct.App.1986), the court, holding that the proper procedure for a prime contractor to contest the inclusion of a goal for the participation of women in a particular project was a protest to the bid solicitation, not a challenge of the award of the contract to another bidder, stated: "The purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to *assure fair competition* among them, to *correct and clarify plans and specifications prior to accepting bids.*" *Id.* (emphasis added). If the plaintiff in *Capeletti* had filed a timely protest to a goal, the Secretary, if he had found that the challenge to the goal was merited, would have corrected the contract's specifications by eliminating or altering the goal before he accepted bids.

329, 331 (Fla.1980) ("the principle underlying the exhaustion requirement is inapplicable where adequate remedies do not abide within the administrative sphere"). A prime contractor, on the other hand, must exhaust the administrative procedures before a Florida court will hear its claim, as an appeal from a final agency action. *Key Haven*, 427 So.2d at 157-58; *State, Dep't of Transp. v. Hendry Corp.*, 500 So.2d 218, 221 (Fla.Dist.Ct.App.1986). Only one exception to this exhaustion requirement exists: if the prime contractor opts to bypass the administrative procedure, it may challenge the facial constitutionality of section 339.0805 in a Florida court *without* exhausting administrative remedies. *Key Haven*, 427 So.2d at 157 (citing *Gulf Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc.*, 361 So.2d 695, 699 (Fla. 1978)). If the contractor chooses to file a protest, however, it will be required to exhaust administrative procedures and raise its claim that the statute is facially unconstitutional on judicial appeal from agency action. *Id.; Hendry Corp.*, 500 So.2d at 221 (a contractor that had already completed a protest and filed an appeal therefrom could not challenge the facial constitutionality of section 339.0805 in a Florida trial court, but was limited to raising the claim in an appeal from the agency decision).

Fifth, nothing precludes a prime or subcontractor that wishes to raise an equal protection challenge to a set-aside or goal in a particular contract from filing its challenge directly in federal court when the plans and specifications of the contract are announced.[30] A federal court

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[30] The contractor presumably would file such an action under 42 U.S.C. § 1983 (1988), alleging that the Secretary had

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considering such a constitutional challenge could grant a temporary restraining order preventing the award of the contract until the merits of the challenge are resolved and, if it finds that the claim is merited, order the Secretary not to set aside the contract, to eliminate the goal, or to award the contract to the plaintiff. *See Choctaw Mfg. Co. v. United States*, 761 F.2d 609, 619 (11th Cir. 1985) (holding that a district court may enjoin the performance of a contract and may order a government contracting officer to award the contract to an unsuccessful bidder if "it is clear that, but for the unlawful conduct of the contracting officer, the contract would have gone to the successful bidder").[31]

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deprived the contractor of the equal protection of the laws under color of state law. Therefore, under *Patsy v. Board of Regents*, 457 U.S. 496, 516, 102 S.Ct. 2557, 2568, 73 L.Ed.2d 172 (1982), the contractor would not be required to exhaust state administrative remedies before bringing its federal suit. *See also Grandison v. Smith*, 779 F.2d 637, 642 (11th Cir.1986).

If the contractor filed its action under 42 U.S.C. § 2000d (1988), it similarly would not be required to exhaust state administrative remedies before suing in federal court. *Doe v. Garrett*, 903 F.2d 1455, 1460 (11th Cir.1990) ("it is established, as a general matter, that Title VI [42 U.S.C. §§ 2000d-2000d-7] . . . does not incorporate Title VII's requirement of exhaustion of administrative remedies").

[31] A district court ordering such relief must consider several equitable factors, including:

> [W]hether the contract has already been awarded to another party, and if so, is being performed; the extent an order awarding the contract to the unsuccessful bidder is necessary to vindicate the interest

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In summary, for the award of highway construction contracts in Florida, the program works as follows. The Secretary of Transportation sets an overall goal for DBE participation in all monies expended from the State Transportation Trust Fund. Unless the Secretary in his discretion determines that the goal should be less than ten percent, the goal is set at ten percent. The Secretary, through the FDOT, then decides to award a highway construction contract from funds in the State Transportation Trust Fund, using either state funds or a combination of federal aid and state funds. If three qualified DBE prime contractors are available, the Secretary might institute a set-aside, limiting bidding on the contract to DBEs only. If the Secretary does not limit bidding to DBEs, he may set a goal for DBE subcontractor participation in that contract. This goal, which does not specify which areas of the contract DBEs must perform, is included in the specifications of the contract sent to prime contractors. Each prime contractor then decides which portions of the contract to award to DBE subcontractors, and prepares and submits a bid listing its determination of DBE participation. The Secretary awards the contract to the lowest bidder that either meets the DBE goal or demonstrates that it has made good faith efforts to meet that goal.

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> of the public, and competing bidders, in the agency's adherence to the law; and the cost to the government, and hence to the taxpayers, of substituting an unsuccessful bidder for the successful bidder whose price may have been considerably lower.

Choctaw, 761 F.2d at 619.

This process could adversely affect a nonDBE contractor in one of three ways. First, a nonDBE *prime* contractor may be excluded from bidding altogether on a set-aside contract. Second, a nonDBE *prime* contractor could submit a low bid which does not meet the DBE goal, fail to demonstrate its good faith effort to meet the goal, and lose the contract to a higher bidder that met the goal or demonstrated its good faith efforts to do so. Third, a nonDBE *sub*contractor might submit a low bid to a prime contractor but lose the subcontract to a DBE solely because of the DBE goal.

A contractor that is aggrieved by this process has many different administrative or judicial opportunities to challenge the program's application on the grounds that such application violates the equal protection clause of the fourteenth amendment. First, the contractor could file a third party challenge to the presumptively disadvantaged status of any individual who is seeking highway construction work. Second, it could demonstrate to the Secretary that it has made a good faith effort to meet the DBE goal and that its bid should therefore be considered. Third, it could challenge either a set-aside or a DBE goal in contract specifications by protesting a bid solicitation or award. Fourth, it could challenge the solicitation or award of a contract in state court, after exhausting the state administrative remedies available to it. Fifth, it could seek relief in a federal court against the solicitation or award of a contract.[32]

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[32] In addition to these remedies, any person "adversely affected" by any action of the Secretary may exercise the appeal rights granted by 49 C.F.R. part 23. Fla.Admin.Code Ann. r. 14-78.0081.

II.

The plaintiffs in this case are eight prime contractors[33] and one specialty subcontractor[34] engaged in the business of highway construction in the state of Florida. All are owned by white males. In their complaint, the plaintiffs alleged that the Secretary of Transportation[35] has been implementing the section 339.0805 DBE program in a manner that discriminates against them on account of their race, in violation of the equal protection clause of the fourteenth amendment;[36] as a result, they have been

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[33] The prime contractor plaintiffs are the Cone Corporation; C.H. Barco Contracting Company, Inc.; Asphalt Pavers, Inc.; J.W. Conner & Sons, Inc.; Cone Constructors, Inc.; Leware Construction Company; Capeletti Brothers, Inc.; and Hewitt Contracting Company, Inc.

[34] The specialty subcontractor plaintiff, O.B. Brooks & Sons Grassing, Inc., does grassing, fencing, mulching, and erosion control work. The company regularly bids for the subcontracts for these components of state highway construction projects.

[35] In addition to the Secretary, the plaintiffs sued the FDOT and the Governor. The Governor has been dismissed from the action, and the plaintiffs' claims against him are not before us.

[36] Although women, as well as members of minority groups, are presumptively disadvantaged, the plaintiffs do not allege that the Secretary has denied or is likely to deny them equal protection on account of sex.

The plaintiffs also asked for declaratory and injunctive relief with regard to the Secretary's "practice, policy, custom, and usage" of encouraging or requiring consideration of racial or ethnic criteria in the selection of bids for highway construction work. Because the plaintiffs have not alleged, or presented, any facts indicating that such a pattern of behavior has

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deprived of FDOT highway construction work and, unless the Secretary is permanently enjoined from implementing the DBE program, they will lose more work.[37]

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existed independently of the statute or rules, we do not consider this request for relief as referring to a separate claim. We thus limit our consideration to the operation of section 339.0805 and the regulations promulgated thereunder.

[37] The plaintiffs' sought relief on their equal protection claim against the Secretary under 42 U.S.C. § 1983, (1988), which provides a right of action to those deprived of a constitutional or statutory right "under color of law." They also sought relief against the Secretary under 42 U.S.C. § 1981 (1988), which provides that all citizens have the same contract and property rights as white citizens, and under 42 U.S.C. § 2000d (1988), which prohibits discrimination under any program receiving federal assistance.

The plaintiffs also sought relief against the FDOT under all three of these provisions, but the district court dismissed the section 1983 and section 1981 claims, finding that the FDOT was immune from suit under the eleventh amendment of the United States Constitution. The court allowed plaintiffs to proceed against the FDOT on their section 2000d claim, however, under the express abrogation of eleventh amendment immunity found in 42 U.S.C. § 2000d-7(a)(1).

We agree with the district court that section 2000d gives plaintiffs an implied private right of action against the FDOT and the Secretary. *See Cannon v. University of Chicago*, 441 U.S. 677, 703, 99 S.Ct. 1946, 1961, 60 L.Ed.2d 560 (1979) ("we have no doubt that Congress . . . understood Title VI [section 2000d *et seq.*] as authorizing an implied private cause of action for victims of the prohibited discrimination"); *Doe*, 903 F.2d at 1460; *Bossier Parish School Bd. v. Lemon*, 370 F.2d 847, 852 (5th Cir.), *cert. denied*, 388 U.S. 911, 87 S.Ct. 2116, 18 L.Ed.2d 1350 (1967). Supreme Court precedent is unclear, however, as to

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The plaintiffs sought no relief with respect to the construction contracts they have already lost. Presumably, those contracts have been completed, and an order

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whether or under what conditions a plaintiff suing under section 2000d may receive compensatory, as opposed to declaratory and injunctive, relief. *Guardians Ass'n v. City of New York*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) (seven justices find a right of action, but differ on whether a plaintiff must show discriminatory intent to receive compensatory relief).

In this Circuit, until the Supreme Court clarifies its position, a plaintiff may receive only prospective declaratory and injunctive relief in a section 2000d suit. *Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617, 622 (11th Cir.1990) (discussing Title IX but stating that the analysis is interchangeable with Title VI); *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 133 (5th Cir. Unit A 1981) ("this private right of action under Title VI encompasses no more than an attempt to have any discriminatory activity ceased"). The language of section 2000d-7 does not change this result. *See* 42 U.S.C. § 2000d-7(a)(2) ("[i]n a suit against a State for a violation of [section 2000d], remedies (including remedies both at law and at equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State"); *Franklin*, 911 F.2d at 621-22 (finding that this language "has no direct bearing on . . . whether a cause of action for money damages will lie").

Thus, although plaintiffs may sue both the Secretary and the FDOT under section 2000d, they may receive only declaratory and injunctive relief. Their action against the FDOT is, therefore, redundant. The FDOT may act only through human agents. If a court were to issue an injunction purporting to bind the FDOT, the Secretary would be responsible for insuring that the agency obeyed the injunction, and would bear the risk

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declaring that the Secretary denied the plaintiffs, or any one of them, the equal protection of the laws in awarding those contracts could gain the plaintiffs nothing save a moral victory. Rather, the plaintiffs sought a judgment declaring section 339.0805 and the regulations promulgated thereunder unconstitutional on their face and permanently enjoining the Secretary from implementing the DBE program. As an interim measure, the plaintiffs asked the district court to issue a preliminary injunction directing the Secretary to refrain from setting aside or including goals in contracts pending the entry of final judgment.

The Secretary promptly moved the court to dismiss the plaintiffs' complaint for failure to state a claim for relief or, alternatively, to require the plaintiffs to file a more definite statement. While his motion was pending, the court heard and denied the plaintiffs' application for a preliminary injunction. The court thereafter required the plaintiffs to amend their complaint with a more definite statement. The plaintiffs did so, filing an amended complaint (which, for our purposes, added nothing to the original complaint). The Secretary then answered the amended complaint, denying the plaintiffs' allegations of

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of civil contempt proceedings to enforce its terms. *See* Fed.R.Civ.P. 65(d) (injunctions binding on the parties to the action and "their officers, agents, servants, employees, and attorneys"); *Blalock v. United States*, 844 F.2d 1546, 1559 (11th Cir.1988) (describing the function of civil contempt in enforcing injunctions). This opinion, accordingly, will refer to the Secretary as the sole defendant.

racial discrimination and challenging their standing to prosecute the suit.

After the parties joined issue, the plaintiffs moved for summary judgment; they also renewed their application for a preliminary injunction. The court denied their application, but granted them summary judgment.[38] In its dispositive order, the court declared that, on their face, section 339.0805 and the regulations promulgated thereunder denied the plaintiffs the equal protection of the laws guaranteed them by the fourteenth amendment with respect to FDOT contracts funded solely by the State of Florida. The court reasoned, under the strict scrutiny standard of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92, 109 S.Ct. 706, 720, 102 L.Ed.2d 854 (1989), that although a state "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction" if it "identifies that discrimination with the particularity required by the Fourteenth Amendment," the Florida legislature had not identified *any* prior discrimination within the state of Florida before enacting the DBE program, and therefore the program was invalid.[39] The

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[38] The plaintiffs immediately appealed this ruling. *See supra* note 1.

[39] The parties in this case stipulated, and the district court found, that when the Florida legislature enacted section 339.0805 it made *no* formal studies or findings of discrimination in the highway construction industry in Florida but relied instead on the congressional findings of discrimination in the industry nationwide. Given our disposition of this appeal, we need not decide, whether the legislators' reliance on Congress' findings would satisfy *Croson*'s mandate. We note that *Croson* seems to indicate that a blanket reliance on federal findings is

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district court noted, however, that the statute was modeled after an almost identical federal scheme, and concluded that the Florida program was mandated by, or was an extension of, the federal program.[40] Because a very similar federal program had passed constitutional muster in *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the court concluded that when implemented with federal funds, the Florida program was constitutional.

The plaintiffs now challenge this decision. They contend that the district court erred in upholding section 339.0805 and the regulations with respect to FDOT contracts funded by the federal government. They also contend that the district court erred in denying them permanent injunctive relief.[41]

We do not reach the merits of plaintiffs' challenges. As the following discussion makes clear, the plaintiffs

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unacceptable as evidence that a state has sufficiently identified prior discrimination. 488 U.S. at 503-06, 109 S.Ct. at 726-27. In this case however, it is unclear, and we need not determine, whether Florida's reliance on Congressional findings was such a blanket acceptance, or whether specific portions of the Congressional testimony might support Florida's legislative scheme.

[40] According to the district court, "the federal highway funds do not come to the State of Florida in fee simple. They come in 'trust,' and Florida's use of the funds necessitates strict compliance with the Congressional mandate regarding use of such funds."

[41] The defendants, on cross-appeal, assert, *inter alia*, that the plaintiffs lack standing to prosecute their facial attack on Florida's DBE program.

lack standing to bring this suit; accordingly, the district court, rather than granting the plaintiffs the relief it gave them, should have dismissed the case.[42]

III.

Article III of the United States Constitution limits the jurisdiction of the federal courts to actual cases and controversies. U.S. Const. art. 3, § 2. The standing doctrine is an aspect of this case or controversy requirement, *Flast v. Cohen*, 392 U.S. 83, 94-101, 88 S.Ct. 1942, 1949-53, 20 L.Ed.2d 947 (1968), and has its origins in "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 95 S.Ct. 2197, 2204, 45 L.Ed.2d 343 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249, 255-56, 73 S.Ct. 1031, 1034-35, 97 L.Ed. 1586 (1953)); *O'Hair v. White*, 675 F.2d 680, 685 (Former 5th Cir.1982) (en banc). The constitutional aspect of the standing requirement eliminates claims "in which the plaintiff has failed to make out a case or controversy between himself and the defendant." *Gladstone, Realtors v. Village v. Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979); *Lynch v. Baxley*, 744 F.2d 1452, 1455-56 (11th Cir.1984).[43] The requirement that

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[42] Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Morast v. Lance*, 807 F.2d 926, 932 n. 6 (11th Cir.1987).

[43] Prudential limits on standing, which are not implicated in this case, include the principle that federal courts should

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the individual plaintiff have standing is based on the need "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962).

A plaintiff must meet three requirements to have article III standing. First, if, as here, the plaintiff seeks declaratory and injunctive relief, he must demonstrate that he is likely to suffer future injury; second, that he is likely to suffer such injury at the hands of the defendant; and third, that the relief the plaintiff seeks will likely prevent such injury from occurring. *Whitmore v. Arkansas*, ___ U.S. ___, ___, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990); *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citing *Gladstone, Realtors*, 441 U.S. at 99, 99 S.Ct. at 1608; *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41,

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avoid deciding generalized grievances that present "abstract questions of wide public significance," *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475, 102 S.Ct. 752, 760, 70 L.Ed.2d 700 (1982), the requirement that the plaintiff's compliant be within the "zone of interests" protected by the statute or constitutional guarantee at issue, *id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970)), and the requirement that a plaintiff, even though he may have established an article III case or controversy, assert his own legal rights and interests, not the rights of third parties, *id.* 454 U.S. at 474, 102 S.Ct. at 760.

96 S.Ct. 1917, 1924-25, 48 L.Ed.2d 450 (1976)). Although each of these concepts may blend into the others, the most important is the injury requirement.[44]

The first prerequisite for standing to seek the equitable relief the plaintiffs asked for in this case is the demonstration of a threatened injury. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); *Marshall Durbin Co. v. United States Envtl. Protection Agency*, 788 F.2d 1490, 1492 (11th Cir.1986). The plaintiff must present "specific, concrete facts" showing that the challenged conduct will result in a "demonstrable, particularized injury" to the plaintiff so that the plaintiff "personally w[ill] benefit in a tangible way" from court action. *Warth*, 422 U.S. at 508, 95 S.Ct. at 2210. The injury must be "real and immediate," not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974); *Kerr v. City of West Palm Beach*, 875 F.2d 1546, 1554 (11th Cir.1989). If the plaintiff is prosecuting a constitutional claim, moreover, the injury must be the deprivation of a constitutional right. *Cf.*

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[44] *See* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531.4 (1984).

> The very notion of injury implies a causal connection to the challenged activity; an injury caused by other events is irrelevant to any purpose of standing doctrine. Causation in turn bears on remedial benefit, since a remedy addressed to actions that have not caused the injury will not alleviate the injury.

Id.

O'Hair, 675 F.2d at 686 ("injury may be to rights existing solely by virtue of a . . . constitution"); *Warth*, 422 U.S. at 500, 95 S.Ct. at 2206 ("the standing question . . . is whether the constitutional . . . provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief").[45]

The second prerequisite for standing, in a case like the one at hand, is that the plaintiff must show that the defendant is likely to cause the anticipated injury – there must be a "fairly traceable" nexus between the threatened deprivation of the constitutional right and the action of the defendant. *Simon*, 426 U.S. at 38, 41-42, 96 S.Ct. at 1924-26; *Allen*, 468 U.S. at 752, 104 S.Ct. at 3325. "The injury must both be caused by the defendant and be remediable by the defendant." *Wehunt v. Ledbetter*, 875 F.2d 1558, 1567 (11th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 1472, 108 L.Ed.2d 609 (1990).[46]

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[45] We realize that the question of whether a party has demonstrated a sufficient injury to litigate a constitutional claim – an actual or threatened deprivation of a constitutional right – necessarily involves a limited inquiry into the merits of the plaintiff's claim to determine whether the injury the plaintiff asserts might stem from a violation of that constitutional guarantee. *Cf. Warth*, 422 U.S. at 500, 95 S.Ct. at 2206 ("Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted." (citation omitted)); *O'Shea*, 414 U.S. at 499, 94 S.Ct. at 677 (standing analysis "obviously shade[s] into [analysis determining] whether the complaint states a sound basis for equitable relief"). This is unavoidable, and provides no justification for ignoring the Article III requirement of a case or controversy and engaging in a full-scale analysis of the merits.

[46] The third prong of standing is that the plaintiff must show that the threat of injury is substantially likely to be

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In sum, a plaintiff seeking declaratory[47] and injunctive relief demonstrates these first two standing requirements only if the plaintiff shows that the defendant is likely to injure the plaintiff.[48] The Supreme Court has acknowledged this in a series of cases. *See Lyons*, 461 U.S. at 105-09, 103 S.Ct. at 1667-69 (plaintiff once subject to a police stranglehold had no standing to seek injunctive relief without a showing that "he was likely to suffer future injury" from police brutality); *Juidice v. Vail*, 430

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removed by a favorable decision. *Simon*, 426 U.S. at 38, 96 S.Ct. at 1924; *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 75 n.20, 98 S.Ct. 2620, 2631 n. 20, 57 L.Ed.2d 595; *Marshall Durbin Co.*, 788 F.2d at 1492. This third prong is closely linked to the second prong (causation), and indeed is sometimes expressed as part of that prong. *Allen*, 468 U.S. at 759 n.24, 104 S.Ct. at 3328-29 n. 24 (in some circumstances, "the 'repressibility' analysis is identical to the 'fairly traceable' analysis"); *Duke Power*, 438 U.S. at 74, 98 S.Ct. at 2631.

[47] When a plaintiff seeks a declaratory judgment that a state statute is unconstitutional, as the plaintiffs do here, the requirements for standing must be strictly enforced. *Griswold v. Connecticut*, 381 U.S. 479, 481, 85 S.Ct. 1678, 1679, 14 L.Ed.2d 510 (1965).

[48] This standing determination – in the equal protection context of this case – of how a government official is likely to treat the plaintiff in the future may be based on two types of evidence: (1) specific instances in the past where the defendant has injured the plaintiff or others, *Lyons*, 461 U.S. at 102, 103 S.Ct. at 1665; *O'Shea*, 414 U.S. at 495-96, 94 S.Ct. at 676; *Lynch*, 744 F.2d at 1457; and (2) statutes, regulations, settled policies, judicial decisions, and other rules which establish the official's authority, mandate the acts that he must perform, and circumscribe his discretion, if any, *cf. Lyons*, 461 U.S. at 105-06, 103 S.Ct. at 1667; *Kerr*, 875 F.2d at 1554.

U.S. 327, 331-33 & n. 9, 97 S.Ct. 1211, 1215-16 & n.9, 51 L.Ed.2d 376 (1977) (plaintiffs who had been released from prison had no standing to seek injunctive relief when the complaint did not allege "the likelihood, or even the possibility, of future contempt orders"); *Rizzo v. Goode*, 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (plaintiffs seeking injunction barring an alleged policy of police brutality had no standing based on "what one of a small, unnamed minority of policemen might do to them in the future"); *O'Shea*, 414 U.S. at 495-96, 94 S.Ct. at 676 (plaintiffs challenging alleged discriminatory bail-setting, jury selection, and sentencing had no standing to seek injunction without a showing that they were likely to be arrested and subject to the challenged practices); *Golden v. Zwickler*, 394 U.S. 103, 108-09, 89 S.Ct. 956, 959-60, 22 L.Ed.2d 113 (1969) (plaintiff who had been convicted for distributing anonymous handbills in past election campaign but whose future conviction was "most unlikely," alleged no controversy deserving declaratory relief for future campaigns). Like the Supreme Court, this circuit, also has acknowledged the plaintiff's need to show the likelihood of injury as a prerequisite for standing to obtain equitable relief. *See Kerr*, 875 F.2d at 1554 (plaintiff bitten by a police dog had no standing to seek declaratory and injunctive relief absent a showing that an unlawful seizure is likely to recur); *Lynch*, 744 F.2d at 1456-57 (plaintiff who was realistically threatened by a repetition of his experience had standing to seek injunction barring state practice of detaining persons awaiting civil commitment in county jails).

In their amended complaint, the plaintiffs alleged that they lost FDOT work because of the DBE program.[49] They alleged no facts, however, to support this allegation; that is, they did not point to any specific contract they

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[49] We note that if one of the prime contractors or the subcontractor plaintiff had shown that it has lost, or was in imminent danger of losing, a specific contract or subcontract because of race in violation of the fourteenth amendment, it would have standing to seek individualized relief, such as damages (if it sued a defendant that was not immune from liability) or an order directing the Secretary to eliminate the set-aside or goal for that contract or to award the contract to the plaintiff. *See, e.g., Choctaw Mfg. Co.*, 761 F.2d at 615-16 (prime contractor standing; " '[n]o serious doubt exists that [a disappointed bidder] suffer[s] economic loss by virtue of [its] inability to obtain the contract at issue' " (quoting *Hayes International Corp. v. McLucas*, 509 F.2d 247, 255 (5th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 123, 46 L.Ed.2d 92 (1975)); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1265 (5th Cir.1978) ("It is by now well settled in this Circuit that unsuccessful bidders for government contracts may have standing to invoke judicial review of procurement decisions."); *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 701, 709-10 (5th Cir.1973), *cert. denied*, 415 U.S. 914, 94 S.Ct. 1410, 39 L.Ed.2d 468 (1974) (prime contractor that lost bid had standing to challenge minority business provisions in the Small Business Act); *Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo*, 743 F.Supp. 977, 986-87, 994-95 (N.D.N.Y.1990); *Capeletti Bros. v. Broward County*, 738 F.Supp. 1415, 1416-17 (S.D.Fla.1990); *Contractors Ass'n v. Philadelphia*, 735 F.Supp. 1274, 1283-84 & n. 3 (E.D.Pa.1990). *Cf. Rocks v. City of Philadelphia*, 868 F.2d 644, 645-48 (3rd Cir. 1989); *Glasgow, Inc. v. Federal Highway Admin.*, 843 F.2d 130, 134-36 (3rd Cir.1988).

The plaintiffs in this case, however, have neither shown that they lost a single contract because the Secretary violated the fourteenth amendment, *see infra* note 51, nor sought individualized relief for any past loss.

lost because the Secretary discrimination against them on account of their race.[50] In short, the plaintiffs' allegation

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[50] Whether a plaintiff has standing to sue is generally determined by assessing the allegations of his complaint. *Warth*, 422 U.S. at 510, 95 S.Ct. at 2206. If, when it addresses the standing issue, the court has facts beyond the four corners of the complaint before it – such as, in this case, the evidence adduced in support of the plaintiffs' motion for summary judgment – the court may consider such facts. *Gladstone, Realtors*, 441 U.S. at 109 n.22, 99 S.Ct. at 1613 n. 22; *see also Church of Scientology*, 777 F.2d at 607 n.24 (standing is "a legal determination based on the facts established by the record"). If it considers facts not disclosed in the complaint, the court, in effect, treats the complaint as having been amended to conform to the evidence. *See* Fed.R.Civ.P. 15(b).

The record presented to the district court in support of the plaintiffs' motion for summary judgment disclosed two allegations in which the Secretary, in the past, *may* have caused a plaintiff to lose an FDOT contract on account of race. Neither of these allegations was specific enough to permit the district court to conclude, however, that a plaintiff had suffered a constitutional injury, and thus may suffer such an injury in the future.

The first allegation came from Douglas P. Cone, president of the Cone Corporation (a prime contractor). Cone alleged, in his deposition, that his company had lost a specific contract on which it had been the low bidder because it failed to meet the DBE goal for the contract.

Second, Cone, in testimony at the preliminary injunction hearing relevant to O.B. Brooks & Sons Grassing, Inc.'s (a subcontractor) standing, stated that his company, to meet the DBE goal on a project, had awarded a specific subcontract to a DBE subcontractor instead of Brooks, although Brooks had submitted the low bid.

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of past racial discrimination at the hands of the Secretary are nothing more than bald conclusions. The plaintiffs' allegations of future injury suffered the same infirmity; the plaintiffs merely concluded that, because of the Secretary's DBE requirements, "they will be injured in their business or property." This conclusory statement was the sole support for their prayer that the district court declare section 339.0805 and the regulations thereunder unconstitutional on their face and enjoin the Secretary from enforcing them.

The plaintiffs provided the district court no facts – either in their amended complaint or in support of their motion for summary judgment – from which the court could predict whether the Secretary would deny them equal protection of the laws in awarding future highway construction contracts.[51] Thus, all the court had before it

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Both of these descriptions are vague, and do not, without further evidence, establish that the Secretary, in the past, deprived plaintiffs of the equal protection of the laws. Brooks, for instance, did not demonstrate any injury to it, as it did not show that the prime contractor actually performed the contract at issue. Neither plaintiff, furthermore, presented any evidence that it had attempted to avoid the alleged discriminatory application of the statute through the administrative or judicial challenge machinery in the scheme. Cone, indeed, admitted that his company had not attempted to present a good faith justification for failing to meet the DBE goal for the contract it lost.

[51] The district court, indeed, specifically found that the plaintiffs alleged no injury:

> The Plaintiffs have also argued and presented some evidence concerning harm to individual prime and

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was the Florida DBE statute, section 339.0805; the regulations promulgated thereunder; the federal DBE statute, STURAA; its implementing regulations; and the Supreme Court's decisions in *Fullilove* and *Croson*. From these statutes, regulations, and Supreme Court decisions – and them alone – the court had to predict how the Secretary would probably treat the plaintiffs in the future if he followed the law, and thus whether the plaintiffs were entitled to the relief they sought.

To make its prediction, the court had to look first to the Florida statute. If section 339.0805 required the Secretary to institute set-asides and goals that were not lawful remedial responses to identified past or present racial discrimination in Florida, then the court could conclude that the plaintiffs might suffer a denial of equal protection – in a case where, but for the set-aside or goal, they would have been the successful bidder. If, to the contrary,

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> subcontractors. But the Plaintiffs have not alleged that any individual plaintiff was harmed in any *specific instance* on a particular contract or opportunity to bid by the manner in which the Defendants have applied the federal requirements, and have not sought individualized relief with respect to application of the Florida statute or regulation to an individual plaintiff with respect to a particular contract or opportunity to bid. . . . [T]here are no allegations that the Florida program has been applied in [an] unconstitutional manner to a particular plaintiff having standing to make that claim.

(Emphasis in original.)

section 339.0805 allowed the Secretary to use his discretion to institute set-asides and goals only where necessary to remedy identified racial discrimination, then the district court had to look elsewhere – to the Secretary's regulations, or STURAA and its regulations – to predict the Secretary's future conduct. The district court took neither of these steps; it simply bypassed the question of the plaintiffs' standing to sue and concluded that because Florida's DBE program could be implemented in an unconstitutional manner, it was unconstitutional on its face (except when implemented with federal funds). Had the court undertaken the two-step inquiry described above, it would have concluded, first, that section 339.0805 does not mandate a denial of equal protection, and, second, that there is nothing in the Secretary's regulations or the federal DBE program that would produce such a denial.[52]

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[52] We are aware that two recent decisions of this Circuit did not explicitly address the question of standing and allowed contractors to pursue declaratory and injunctive relief against the operation of county and city minority business set-aside and goal programs. *See Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir. 1990); *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283 (11th Cir.1990); *cf id.* at 1287-88 (Tjoflat, J., specially concurring) (arguing that plaintiffs had no standing). Since the opinions handed down in support of these decisions did not address the standing issue, we infer no view on the issue from these decisions.

In addition, the determination of whether a case or controversy exists must be made on a case-by-case basis. *Hendrix v. Poonai*, 662 F.2d 719, 721-22 (11th Cir.1981) (per curiam). Standing must be decided on the record before the court; we thus decide the issue here on what is before us.

As we observe in our explanation of Florida's DBE program, there is nothing in section 339.0805 that requires the Secretary to deny the plaintiffs the equal protection of the laws. To be sure, the Secretary is charged with giving DBEs the maximum opportunity to participate in FDOT projects, but, in carrying out this task, he does not have to engage in the sort of racial discrimination the fourteenth amendment proscribes. On the contrary, his oath of office – which requires him to uphold the Constitution and laws of the United States, Fla.Stat. § 876.05 – requires him to avoid such unlawful conduct. Section 339.0805 accommodates his obligation to obey the Constitution by giving him a wide breadth of discretion. *Id.* § 339.0805 (setting a DBE goal of ten percent "except to the extent that the [Secretary] determines otherwise").

To argue that section 339.0805 requires the Secretary to discriminate in violation of the fourteenth amendment is to conclude that the first several words of the statute, giving the Secretary discretion, are meaningless. The plaintiffs might argue, for instance, that the legislative grant of discretion to the Secretary constituted, in effect, an unlawful delegation of legislative power to an administrative agency. Fla. Const. art. 2, § 3.[53] It is unlikely,

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[53] This constitutional provision states, in pertinent part: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." Fla. Const. art. 2, § 3. In Florida, the legislature may not give another branch of government the power "to enact a law or to declare what the law shall be." *Tallahassee Memorial Regional Medical Center, Inc. v. Meeks*, 560 So.2d 778,

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however, that a Florida court considering this state law question would agree.[54] Indeed, one Florida court has

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784 (Fla.1990) (quoting *State v. Atlantic Coast Line Ry.*, 56 Fla. 617, 47 So. 969, 976 (1908)). The legislature must make all fundamental policy decisions, but may give agencies discretion in administering programs pursuant to minimal standards sufficient to "enable the agency and the courts to determine whether the agency is carrying out the legislature's intent." *Id.* (quoting *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So.2d 815, 819 (Fla.1983), *appeal dismissed*, 466 U.S. 901, 104 S.Ct. 1673, 80 L.Ed.2d 149 (1984)). The legislature also may give agencies the power to determine facts to which established policies of the legislature will apply. *Florida Welding & Erection Serv., Inc. v. American Mutual Ins. Co.*, 285 So.2d 386, 388 (Fla.1973).

[54] We note that the United States Supreme Court, in applying a federal constitutional principal akin to Florida's, observed that a federal statute similar to Fla.Stat. § 339.0805 provided sufficient standards for a delegation of legislative power to an executive agency. Describing the Public Works Employment Act of 1977, Pub.L. No. 95-28, § 103(f)(2), 91 Stat. 116, the *Fullilove* Court stated:

> Although the statutory MBE provision itself outlines only the bar bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level of minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. *Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.*

Fullilove, 448 U.S. at 468, 100 S.Ct. at 2769.

found that the enactment of section 339.0805 was a *lawful* delegation of power. *See Hendry Corp. v. State, Dep't of Transp.*, 503 So.2d 944, 944 (Fla.Dist.Ct.App.1987) (the statute is "a valid, reasonable, and constitutional grant of discretion").[55]

The Secretary has exercised this lawfully delegated statutory discretion by promulgating regulations that allow him to administer the DBE program in a constitutional manner. To conclude that section 339.0805 will require the Secretary to injure the plaintiffs means that the fact that the regulations may allow the Secretary to avoid a fourteenth amendment violation is of no moment; the regulations are invalid. In other words, the Secretary

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[55] The court stated:

> Appellant would have us take the first dozen words out of context in order to find an unlawful delegation of legislative authority. This we decline to do. If the entire legislative scheme is considered, it becomes apparent that the statute is not vague, and does not grant the secretary of [F]DOT unbridled authority so as to render the statute unconstitutional. It is a valid, reasonable, and constitutional grant of discretion to the secretary of [F]DOT which is designed to permit the [F]DOT to carry out the DBE . . . program, and to comply with the legislative intent and the federal restrictions on [F]DOT in the letting of contracts.

Hendry Corp., 503 So.2d at 944; *cf. Broward County v. La Rosa*, 505 So.2d 422, 423-24 (Fla. 1987) (holding that a delegation of judicial power is too extensive when it gives an agency the power to award unliquidated damages for discrimination, but implying that an agency may determine whether discrimination has occurred).

gave himself, by regulation, more authority than the statute allowed. For us to find a denial of equal protection under this scenario, we would have to say that the statute plainly requires the Secretary to deny equal protection, that is, a Florida court interpreting Florida law could not reasonably conclude otherwise, and that the regulations – to the extent that they allow the Secretary to exercise discretion – are a nullity. We conclude, on the contrary, that section 339.0805 on its face does not direct the Secretary to violate the fourteenth amendment; consequently, the statute, itself, does not provide proof that the Secretary is likely to deny plaintiffs the equal protection of the laws in letting highway construction contracts.[56] *See Kerr*,

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[56] The opposite seems to have been the case in *Fullilove*. In a footnote, the Supreme Court, alluding to the contractors' standing to seek declaratory and injunctive relief, said:

> In their complaint, in order to establish standing to challenge the validity of the program, petitioners alleged as "[s]pecific examples" of economic injury three instances where one of their number assertedly would have been awarded a public works contract but for enforcement of the MBE provision. *Petitioners requested only declaratory and injunctive relief against continued enforcement of the MBE provision*; they did not seek any remedy for these specific instances of assertedly unlawful discrimination.

448 U.S. at 480 n. 71, 100 S.Ct. at 2776 n. 71 (emphasis added).

The *Fullilove* contractors are distinguishable from the plaintiffs here in two ways. First, the *Fullilove* contractors seem to have alleged specific instances of past unlawful discrimination in sufficient detail to allow the Court to use these instances as evidence of likely future discrimination. The plaintiffs here, on the contrary, demonstrate no such past instances. *See supra* slip opinion at 1416, at ___ & note 51.

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875 F.2d at 1554 (a general policy that permits but does not require unconstitutional conduct is not facially unconstitutional; therefore, plaintiffs have no standing to seek declaratory or injunctive relief against the continuation of the policy). If such proof exists, therefore, it must

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Second, the minority business provision challenged in *Fullilove* provided that recipients of federal public works grants, such as the State and City of New York (defendants in *Fullilove*), were required to institute 10% goals in each public works project for which the recipient received a federal grant. *Fullilove*, 448 U.S. at 454, 100 S.Ct. at 2762 ("no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance . . . that at least ten per[cent] of the amount of each grant shall be expended for minority business enterprises" (quoting Public Works Employment Act of 1977, Pub.L. No. 95-28, § 103(f)(2), 91 Stat. 116)). Thus, the Stat and City of New York in *Fullilove*, unlike the Secretary here, were *required* by federal law to set a 10% goal in each project. Furthermore, although the *recipient* of aid (the city or state) could get a waiver of this goal under the provision at issue in *Fullilove*, the contractors, unlike the plaintiffs here, had no control over whether such a goal was set, because the scheme gave them no protest procedure. *Id.* at 494, 100 S.Ct. at 2783 ("Only the grantee can request a waiver" (quoting U.S. Dep't of Commerce, Economic Development Administration, Local Public Works Program, Round II, Guidelines for 10% Minority Business Participation in LPW Grants 13-15)).

The combination of the evidence of past injuries and the terms of the statute, which gave the grantees no discretion in setting goals and gave the contractors no opportunity to challenge the inclusion of goals in contracts, made it likely that the grantees who were sued in *Fullilove* would injure the plaintiffs in the future. The *Fullilove* plaintiffs, therefore, had standing to seek declaratory and injunctive relief. As neither of these factors exist here, *Fullilove* does not govern this case.

be found in the Secretary's regulations or the federal DBE program, which provides an incentive for the Secretary to act in a way that will enable the FDOT to receive federal funds. We find none.

As our outline of the Florida and the federal programs indicates, both programs provide many administrative and judicial escape hatches that allow the Secretary to avoid a violation of the fourteenth amendment. For instance, in the Florida program, DBE goals are set after a consideration of many different factors, good faith waivers are allowed, a contractor presumably might establish that a particular individual or group is not disadvantaged in Florida, and contractors may challenge bid solicitations and awards in administrative and state judicial proceedings on equal protection grounds. *See supra* slip opinion at 1406-1409, ___-___. The federal scheme contains similar escape hatches, including provisions by which the Secretary may avoid unlawful discrimination and still receive federal funds by submitting a goal of less than ten percent or by getting an exemption from the DBE program requirements. *See supra* slip opinion at 1400-1402, ___-___. Moreover, the federal program expressly directs the Secretary, on pain of losing federal funds, *not to discriminate unlawfully*. *See supra* slip opinion at 1401, at ___. Although the Florida program contains no similar prohibition, the Secretary's oath of office serves the same function. We conclude, therefore, that nothing in the Florida statute and regulations, and nothing in the federal scheme, shows a likelihood that the Secretary will deprive the plaintiffs of contracts on account of their race

in violation of the fourteenth amendment. Having demonstrated no likely injury at the hands of the Secretary, the plaintiffs have no standing to prosecute this action.[57]

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[57] Plaintiffs contended in support of their motion for summary judgment that the structure of the DBE program itself constitutes a sufficient threat of injury to give them standing for declaratory and injunctive relief: the program is likely to burden them, and those like them, with added clerical costs, the possibility of being forced to accept higher DBE bids for subcontracts, and, most importantly, the requirement that they trigger the Secretary's duty to avoid discrimination by using the protest procedures. As examples of past instances of this added burden, Cone alleged that his company had suffered increased clerical costs because of the bookkeeping requirements of the program (his company has one employee who does nothing but keep records on the company's DBE goals and program) and was forced to subcontract work to DBEs at higher prices in order to meet the goals (on one job, the DBE subcontractor bid his company accepted was $13,000 higher than the low bid). Cone also described the protest procedures as "very expensive," although he stated that his company had filed several protests unrelated to the DBE goals.

These burdens, however, are not sufficiently particularized and individual injuries to give the plaintiffs standing to seek the relief they ask. The burdens from the operation of the statute are imposed on all contractors. The DBE program and its added costs are essentially part of the plans and specifications of each contract. Furthermore, the expense of the protest procedure falls on DBE contractors as well as nonDBE firms; the procedures also are available to DBE firms challenging contracts that are not set aside or that do not contain goals. As one plaintiff stated, the added burden is simply an "enforced cost of doing business" in the state of Florida, like hiring an accountant or a lawyer.

The contractor is not actually injured by these increased costs because it simply includes them in its bid and passes and

(Continued on following page)

IV.

A fundamental principle of constitutional law dictates that a federal court should refuse to decide a constitutional issue unless a constitutional decision is strictly necessary. *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-72, 67 S.Ct. 1409, 1419-21, 91 L.Ed. 1666 (1947); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 777 F.2d 598, 604 (11th Cir.1985), *cert. denied*, 476 U.S. 1116, 106 S.Ct. 1973, 90 L.Ed.2d 656 (1986). As the Supreme Court has stated: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is

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(Continued from previous page)

cost on to the FDOT. *See Capeletti Bros.*, 738 F.Supp. at 1417 (stating that "[i]t would be the irrational businessman who did not factor such costs into his bid. . . . [I]t is the [governmental entity] who ultimately absorbs the costs of its program by paying more to complete public construction projects"). Even if the contractor does not always include the increased cost in its bid, as the plaintiffs' evidence seems to indicate, the resulting smaller profits are a problem common to all contractors. *See id.* ("even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders"). *But see Contractors Ass'n*, 735 F.Supp. at 1283-84 n. 3 (finding standing for an association of contractors who alleged, *inter alia*, that the expenses of one contractor member on a specific contract were higher because of the MBE requirements); *Rhode Island Chapter, Associated Gen. Contractors v. Kreps*, 450 F.Supp. 338, 346-47 n. 3 (D.R.I.1978) ("even the successful bidder reduces his profit by having to subcontract work he could have performed himself"); *Constructors Ass'n v. Kreps*, 441 F.Supp. 936, 945-46 (W.D.Pa.1977).

unavoidable." *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 154 89 L.Ed. 101 (1944); *Church of Scientology*, 777 F.2d at 604.

In the same vein, a federal court should not speculate concerning the existence of standing or "piece together support for the plaintiff." *Anderson v. City of Alpharetta*, 770 F.2d 1575 exh. at 1582 (11th Cir. 1985) (per curiam) (incorporating order of district court); *see also Whitmore*, ___ U.S. at ___, 110 S.Ct. at 1723 ("[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing"); *Sims v. Florida, Dep't of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1467 (11 Cir.1989) (Tjoflat, J., dissenting) ("unadorned speculation will not suffice to invoke the federal judicial power" (quoting *Diamond v. Charles*, 476 U.S. 54, 66, 106 S.Ct. 1697, 1705, 90 L.Ed.2d 48 (1976)). In this case, we decline to imagine an injury sufficient to give the plaintiffs standing when they have demonstrated none. If, at some future date, a DBE set-aside or goal which may not be a lawful remedial response to identified past or present discrimination precludes the plaintiffs from obtaining FDOT highway construction work, the plaintiffs may return to the district court and seek relief.

The judgment of the district court is VACATED and the case is REMANDED with the instruction that it be dismissed without prejudice.

IT IS SO ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
FLORIDA TALLAHASSEE DIVISION

THE CONE CORPORATION,
et al.,

Plaintiff,

TCA 88-40042-WS

ORDER

vs.

FLORIDA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

_____/

This cause is before the Court upon the magistrate's report and recommendation dated July 10, 1989. All parties have been furnished copies of the report and recommendation and have been afforded an opportunity to file objections pursuant to 28 U.S.C. § 636(B)(1). Having considered the report and recommendation and all objections thereto timely filed by the parties, the Court has determined that the recommendation should be adopted.

Accordingly, it is

ORDERED:

1. The magistrate's report and recommendation is adopted and incorporated by reference in this order of the Court.

2. Plaintiffs' motion for summary judgment is PARTIALLY GRANTED. Section 339.0805(1), Fla. Stat., and those portions of Ch. 14-78, *F.A.C.*, implementing that statute are DECLARED to be violative of the equal protection clause of the Fourteenth Amendment to the extent

that the statute and implementing rules apply to highway construction contracts administered by the Defendants and not funded by federal funds pursuant to either the STAA of 1982 or the STURAA of 1987. Injunctive relief is unnecessary at this time.

3. The remainder of Plaintiffs' motion for summary judgment is hereby DENIED.

4. Plaintiffs' motion for preliminary injunction is DENIED because it is mooted in part by the grant of partial summary judgment and because Plaintiffs have not demonstrated a substantial likelihood of success on the merits as to the remainder of that motion.

DONE AND ORDERED this 1st day of August, 1989.

/s/ William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

THE CONE CORPORATION,
et al.,

Plaintiff,

TCA 88-40042-WS
(Filed Jul 10, 1989)

vs.

FLORIDA DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

_____/

REPORT AND RECOMMENDATION

I. Procedural status of the case

At issue in this case is the validity of Florida's affirmative action program with respect to expenditure of highway construction funds.

The Plaintiffs are all Florida corporations primarily engaged in the business of highway construction. Eight of the Plaintiffs are so engaged as prime contractors, and one is a specialty subcontractor for the construction industry, including highway construction. The Defendants are the Florida Department of Transportation (FLADOT) and Kaye Henderson, Secretary of the Florida Department of Transportation, in his official capacity.

The amended complaint challenges § 339.0805, Fla. Stat., and Ch. 14-78, *F.A.C.*, and seeks only declaratory and injunctive relief. Doc. 42, p. 27-28. Plaintiffs' claims are primarily based upon the equal protection clause of

Section 1 of the Fourteenth Amendment, but the provisions of 42 U.S.C. §§ 2000d, 1981, and 1983, are also relied upon in the complaint. Doc. 42, p. 7.

In an order entered by the court on September 16, 1988, all claims against the Florida Department of Transportation were dismissed except claims based upon 42 U.S.C. § 2000d. Doc. 39.

Pending before the court are the following motions:

1. Plaintiffs' motion for summary judgment (doc. 46), documents in support thereof (doc. 47), and Defendants' response in opposition to summary judgment (doc. 55).[1]

2. Plaintiffs' renewed motion for a preliminary injunction (doc. 51), the Defendants' response (doc. 56), and Plaintiffs' renewed and expanded motion for a preliminary injunction (doc. 63).[2]

The court referred these pending motions to the magistrate for a hearing as needed and a report and recommendation. Doc. 65.

Oral argument was held on the pending motions on June 23, 1989. No evidence was taken at that hearing.

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[1] Additionally pertinent to the Plaintiffs' motion for summary judgment are the Plaintiffs' reply memorandum (doc. 57), Plaintiffs' notice of supplemental authority (docs. 60 and 62), Defendants' joinder in supplemental authority (doc. 61), and depositions on file (doc. 54).

[2] Plaintiffs' prior motion for a preliminary injunction (docs. 3, 4, and 18) was denied by the court after hearing on March 25, 1988 (docs. 20, 21, and 23).

II. Facts Which are not disputed

The following facts appear to be uncontested as indicated by the representations of the parties at oral argument:

1. The Florida Department of Transportation expends state and federal money on the construction of highways in Florida. With respect to a large number of highway construction projects, the funds are commingled, with a substantial portion of the funds coming from the United States, and matching funds from the State of Florida. On other highway construction projects which are clearly identified before bidding takes place, the funds are 100% from the State of Florida and do not involve any federal money.

2. For the letting of contracts scheduled for June 28, 1989, the Defendants agreed that any such contracts funded 100% by state funds, without federal money, would be awarded without implementation of the state's program for contracting with socially and economically disadvantaged businesses.

In Florida fiscal year 1987-88, the Defendants awarded $436.2 million in road and bridge construction contracts, $278.4 million of which involved federal participation. In fiscal year 1988-89, to March 28, 1989, $377.6 million in contracts had been let, and $293.5 of this amount involved federal participation. Doc. 55, Ex. L, affidavit of Richard M. Singleton. Thus, since the beginning of the 1988-89 fiscal year, $813.8 million has been awarded, $571.9 million of which was involved federal participation. Ten percent of the amount involving federal participation is $57.19 million, which is seven percent

of the total amount of highway construction contracts awarded by Florida in the period.

The parties have stipulated that:

> The Florida Department of Transportation, based upon its belief that it could rely upon Congressional findings of discrimination in the highway construction industry, never conducted a formal disparity study for the specific purpose of determining the extent of any past discrimination and its present effects in the highway construction industry of Florida, prior to the enactment of the DBE statute under attack in this lawsuit.

It appears undisputed that at the time that § 339.0805, Fla. Stat., was enacted by the Legislature of the State of Florida, there were *no* legislative findings made, and no legislative history exists, concerning the present effects of past racial or ethnic discrimination in the highway construction industry in Florida or by the State of Florida in implementing its construction of highways in Florida.

On January 6, 1983, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), Pub.L.No. 97-424, 96 Stat. 2097. Section 105(f) of the Act provided as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. section 637(d)) and relevant subcontracting regulations promulgated thereto.

15 U.S.C. § 637(d)(2) and (3) provides a definition of "socially and economically disadvantaged individuals" by mandating that federal contractors "presume" that such persons "include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)]."

The United States Department of Transportation (USDOT) promulgated detailed regulations implementing the STAA of 1982. 49 C.F.R. part 23, subpart D (1986). 49 C.F.R. § 23.62 defined "socially and economically disadvantaged individuals" in essentially the same way as the Small Business Act.[3] The definition is described as a rebuttable presumption.

Section 339.0805, Fla. Stat., was enacted by Ch. 83-3, § 58, Laws of Florida, and initially was placed in the Florida Statutes as subsection (4) of § 339.081, Fla. Stat., to read:

> 339.081 **State Transportation Trust Fund; accounts.–**
>
> * * *

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[3] 49 C.F.R. § 23.62 defines "socially and economically disadvantaged individuals" to mean "those individuals who are citizens of the United States (or lawfully admitted permanent residents) and who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act."

> (4) Except to the extent that the secretary of the Department of Transportation determines otherwise, not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals *as defined by section 8(d) of the Small Business Act (15 U.S.C. s. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto.* (E.S.)

Thus, Florida adopted verbatim the definition of "socially and economically disadvantaged individuals" previously adopted in the Surface Transportation Assistance Act of 1982, and adopted verbatim the 10% expenditure goal of the federal act, including the provision for administrative exceptions by the secretary of the department.

Prior to 1983, apparently the Florida Department of Transportation had a rule that encouraged contractors to involve minority businesses in contracts, but there was no state mandated program to award a percentage of funded contracts to minority businesses. The Florida rules that then existed were in compliance with earlier federal legislation and rules. Deposition, Tyrone Reddish, pp. 12-16, 24. The mandated 10% participation came after the STAA of 1982 was enacted. *Id.*, p. 16, 22. The president of Plaintiff Cone Corporation, Douglas P. Cone, characterized the 10% Florida goal as a "federal mandate" at the hearing upon the first motion for preliminary injunction, Transcript, p. 84.

It is inferred from the foregoing that Florida enacted the predecessor to § 339.0805, Fla. Stat., in 1983, to comply with the requirements of the federal statute, STAA of

1982, in order that it could receive federal highway construction funds.

The Florida statute was amended again by § 208, Ch. 309, Laws of Florida, § 1, ch. 84-370, Laws of Florida, and § 22, Ch. 85-180, Laws of Florida. These amendments in relevant part added three sentences to the section and moved it to § 339.0805(1)(a), Fla. Stat.

On January 21, 1987, Congress enacted the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). Pub.L. 100-17, 100 Stat. 145. Section 106(c) of the Act contained language identical to section 105(f) of the 1982 STAA establishing a 10% goal for expenditures with disadvantaged businesses, but added women to the disadvantaged definition. The Act applies to appropriations through 1992.[4]

Senate Report 100-4, January 27, 1987, Senate Committee on Environment and Public Works, provided the following findings:

> The Committee has considered extensive testimony and evidence of the bill's DBE provision, and has concluded that this provision [the disadvantaged business enterprise program] is *necessary to remedy the discrimination faced by socially and economically disadvantaged persons attempting to compete in the highway mass transit construction industry. Congress originally addressed this issue in section 105(f) of the 1982 STAA. That provision was modeled after a similar provision in the Public Works Employment Act of 1977, which has been*

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[4] Section 105(f) of the 1982 STAA and § 106(c) of the 1987 STURAA apply only to programs under the Federal Highway Administration and Urban Mass Transit Administration.

> *found valid by the Supreme Court in* ***Fullilove v. Klutznick.***
>
> Section 105(f) has helped to reduce the effects of discrimination; however, *barriers still remain,* preventing minorities and women from successfully competing in the industry. . . . (E.S.)

Doc. 47, Ex. D, p. 41, Ex. Q, p. 11.

On October 21, 1987, the Department of Transportation promulgated amendments to the regulations required by the 1987 Act. 52 Fed. Reg. 39225-31. The current regulations are codified at 49 C.F.R. part 23, subpart D (1988).

The amended regulations continued to define "socially and economically disadvantaged individuals" in the same way as under the STAA, but like the STURAA, included women as well. 49 C.F.R. § 23.62.

Pursuant to 49 C.F.R. § 23.61, unless the Secretary of the USDOT determines otherwise, not less than 10% of the funds authorized by the STURAA must be expended by recipient states for small business concerns owned and controlled by "socially and economically disadvantaged individuals." The regulation further provides that the 10% level of participation "will be achieved if recipients under the programs covered by this subpart *set and meet overall disadvantaged business goals of at least ten percent.*" (E.S.)

Annually, each state recipient of federal funds must submit its goal to the Secretary of the USDOT. For recipients of federal-aid highway funds, the goal will be a percentage of all such funds that the recipient will expend in USDOT-assisted contracts in the forthcoming

fiscal year. If the goal submitted is less than 10%, there is a procedure for seeking USDOT approval of a lesser goal. A state must show its efforts to locate disadvantaged businesses, to make such businesses aware of contracting opportunities, to encourage disadvantaged businesses, and must provide information concerning legal or other barriers impeding participation of disadvantaged businesses, the availability of such businesses to work on the recipient's contracts, the size and other characteristics of the minority population in the recipient's jurisdiction and the relevance of such statistics to the potential availability of such businesses. 49 C.F.R. §§ 23.64 and 23.64 [sic].

The Administrator of the USDOT has authority to approve a goal less than 10% if a finding is made that the recipient is making all appropriate efforts to increase disadvantaged business participation to 10%, and that despite such efforts, the lower goal is a reasonable expectation given the availability of disadvantaged businesses. 49 C.F.R. § 23.66.

Pursuant to 49 C.F.R. § 23.68, the failure of a state that receives federal highway construction funds to have an approved MBE program and an approved overall goal can result in the suspension or termination of federal funds. The same section provides that the state has the opportunity to explain to the federal administrator why the goal could not be achieved and why meeting the goal was beyond the state's control, and the administrator has authority to grant exceptions.

In addition to the waivers available to the states above, 49 C.F.R. § 23.69 provides that a recipient state must establish a procedure whereby the individual status

of those persons presumed [due to race or ethnicity] to be "socially and economically disadvantaged" can be challenged by a third party. The recipient must ultimately resolve the challenge, determining that the person is or is not socially and economically disadvantaged. The state's decision is then appealable to the USDOT pursuant to 49 C.F.R. § 23.55.

In 1987, the Florida Legislature again amended § 339.0805(1)(a), Fla. Stat. The only change was to conform the definition of "small business concerns owned and controlled by socially and economically disadvantaged individuals" to the definition "as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987." Ch. 87-93, § 7, Laws Of Florida.

Section 339.0805(1)(a), Fla. Stat., as challenged in this case now reads:

> **339.0805 State Transportation Trust Fund; specified percentage to be expended with small businesses owned by socially and economically disadvantaged persons; construction management development program; bond guarantee program.–**
>
> (1)(a) Except to the extent that the head of the department determines otherwise, not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals *as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987.* (E.S.)

The Florida Department of Transportation has adopted rules pertaining to § 339.0805(1)(a), Fla. Stat.

Chapter 14-78, *F.A.C.* Doc. 47, pp. 5-11. Rule 14-78.002(1), *F.A.C.*, defines "socially and economically disadvantaged individuals" in the same way as defined by the STAA, STURAA, and using language identical in all relevant parts as that used by the United States Department of Transportation in 49 C.F.R. § 23.62. Like those definitions, the Florida rule provides that the presumption based upon race or ethnicity is rebuttable. Rule 14-78.005(7)(b)2., *F.A.C.*, also provides that "[i]ndividuals certified by the Small Business Administration, pursuant to Section 8(a) of the Small Business Act (15 U.S.C. 637), as socially and economically disadvantaged, shall be accepted as socially and economically disadvantaged individuals for purposes of this rule chapter."

A procedure is provided by rule 14-78.007(7), *F.A.C.*, for third persons to challenge the socially and economically disadvantaged status of any individual except those who hold a current section 8(a) certification from the federal Small Business Administration.

Pursuant to rule 14-78.003(1), *F.A.C.*, in setting overall goals for the FLADOT for its disadvantaged business enterprise (DBE) program, the department is to consider "the number and types of contracts to be awarded by the Department," "the number of certified DBEs likely to be available to compete for contracts," and "the past experience of the Department in meeting its goals and the results and reasons therefor."

Pursuant to rule 14-78.003(2)(b), *F.A.C.*, the department may implement its DBE goal program by establishing contract goals on each contract with subcontracting

opportunities for certified DBE's, and when setting individual contract goals is to consider the following factors:

a. the type of work required by the contract to be let;

b. the subcontracting opportunities in the contract to be let;

c. the estimated total dollar amount of the contract to be let; and

d. the number of certified DBEs.

Goals are set by individual consideration of each contract. Transcript, first hearing on motion for preliminary injunction, Juanita Moore, p. 32; deposition, Kenneth Sweet, pp. 8-16. A significant portion of the contracts let, perhaps as much as one-third, have a 0% goal set, and others have a goal less than 10%. Deposition, Tyrone Reddish, p. 57; deposition, William Barlow, p. 59.

Rule 14-78.003(2)(b)3., *F.A.C.*, then provides procedures to be followed by the Florida Department of Transportation in determining whether to grant a waiver to a bidder who cannot meet or exceed the contract goals set by the department. That rule provides that as an alternative to meeting the goals, a bidder may demonstrate that "good faith efforts were made to meet the goals." Subparagraph c. of that subsection provides procedures for evaluating the good faith of a bidder that fails to meet the DBE contract goals. Included in the list of subjects to be evaluated is whether at least seven days prior to the bid letting the bidder contacted all certified DBE's who perform the type of work solicited to advise them of the opportunity, whether the bidder selected

economically feasible portions of the work to be performed, whether the bidder provided assistance to the DBE's, whether the DBE goal was met by other bidders, whether the bidder submits to the department all quotations from DBE's, whether the bidder assisted interested DBE's in bonding, lines of credit, or insurance, whether the bidder selected types of work to subcontract that matched the capabilities of solicited DBE's, whether the bidder's efforts could not reasonably be expected to produce sufficient DBE participation to meet the goals, and whether the bidder has used DBE's within the past six months on other contracts. The rule states that the list is not intended to be exhaustive.

Finally, rule 14-78.0081, *F.A.C.*, provides that "[i]n addition to the other [state] remedies provided in this rule chapter, *any person adversely affected by any action taken by the Department may exercise the appeal rights granted in 49 C.F.R. Part 23.*" (E.S.)

Florida has met its 10% goal in all years since the enactment of the Florida statute in 1983. Deposition, Tyrone Reddish, p. 23; deposition, Juanita Moore, p. 25. The USDOT monitors the progress of a state towards its approved goal on a quarterly and annual basis. Deposition, James E. St. John, p. 11.

Of the 390 certified general highway construction contractors in Florida, 18 (4.6%) are minority businesses. Doc. 55, Ex. K.

Because the definition of "socially and economically disadvantaged individuals" is based upon the presumption that racially and ethnically described individuals are socially and economically disadvantaged, the Florida

statute and regulations in fact confers unequal benefits upon individuals based upon race and ethnicity.

III. Legal analysis

A. Prerequisites for a preliminary injunction

A preliminary injunction will not issue unless the Plaintiffs satisfy the four prerequisites for a preliminary injunction:

1. A substantial likelihood that plaintiffs will prevail on the merits,

2. A substantial threat that the plaintiffs will suffer irreparable injury if the injunction is not granted,

3. The threatened injury to plaintiffs outweighs the threatened harm the injunction may do to defendant,

4. And the granting of the preliminary injunction will not disserve the public interest.

Canal Authority of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974); *Johnson v. United States Department of Agriculture*, 734 F.2d 774, 781 (11th Cir. 1984).

Analysis of the merits is the most important factor under consideration with respect to the motion for preliminary injunction because such analysis is also necessary to determine the Plaintiffs' motion for summary judgment.

B. The merits

1. Should "strict scrutiny" be applied to the Florida statute and rules in accordance with the *Croson* case?

This case involves the validity of remedies for violations of the equal protection clause found in Section 1 of the Fourteenth Amendment.[5] The Plaintiffs argue that the State of Florida has enacted a remedy for assumed violations of the equal protection clause in the state highway contracting industry, and that the remedy enacted is itself violative of the equal protection clause pursuant to the standard of "strict scrutiny" relied upon in the Supreme Court's recent decision in *City of Richmond v. J. A. Croson Company*, ___ U.S. ___, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

The *Croson* decision applied "strict scrutiny" to a similar race-conscious affirmative action program enacted by the City of Richmond, a program apparently intended by the City of Richmond to remedy the effects of prior race discrimination in the construction industry in that city. In several opinions, and relying upon *Wygant v. Jackson Board of Education, et al.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), Justices O'Connor, White, 1842, 90 L.Ed.2d 260 (1986), Justices O'Connor, White, Kennedy, Scalia, and Chief Justice Rehnquist in *Croson*, adopted a "strict scrutiny" or "searching judicial inquiry" standard of review. 109 S.Ct. at 720-723, 734, 735.

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[5] Analysis pursuant to 42 U.S.C. §§ 2000d, 1981, and 1983, which have also been relied upon by the plaintiffs, is essentially the same as pursuant to the equal protection clause of the Fourteenth Amendment. *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583, 585 n. 3 (6th Cir. 1987).

The program enacted by the City of Richmond in the *Croson* case had been enacted by the city entirely on its own, and not in relationship to a federal program.

To the extent that the Florida statute and rules implement Florida highway construction contracts funded entirely by state funds, without any connection to the federal disadvantaged business legislation discussed above, the Florida program is exactly the same in character as the program enacted by the City of Richmond in the *Croson* case. It was the independent legislative act of Florida, it used race and ethnicity to confer unequal benefits among individuals, and must be subjected to strict scrutiny in the same manner as the program of the City of Richmond was strictly scrutinized by the Supreme Court in the *Croson* case.

"Strict scrutiny" involves two determinations: whether the racial classification is justified by a "compelling governmental interest," and whether the means chosen to effectuate the compelling interest are "narrowly tailored to the achievement of that goal." *Wygant*, supra, 106 S.Ct. at 1846.

Determination of whether the means chosen are narrowly tailored cannot be accomplished without reference to the evidence of the state's compelling interest. " . . . [I]t is impossible to evaluate the necessity of the layoff provision as a remedy for the apparent prior employment discrimination absent reference to that goal." *Wygant*, 106 S.Ct. at 1857. (Justice O'Connor, concurring). To the same effect is *Croson*: " . . . [i]t is almost impossible to assess

whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." 109 S.Ct. at 728.

In the case at bar, there were no findings of any sort made by the Florida Legislature (or the Department of Transportation, for that matter) when it enacted the challenged statute, § 339.0805, Fla. Stat. Thus, there is no evidence in this record that the Florida statute, and the rules that implement the statute, were based upon legislative findings of prior racial or ethnic discrimination within the Florida highway construction industry, or by the State in its administration of the Florida highway construction program.

The Defendants argue that the *Croson* decision is new law, and that the court should permit the Defendants an opportunity now to present evidence of prior discrimination to support the Florida statute. Doc. 55, p. 24, n. 5. The Defendants' argument is not persuasive. At issue is the validity of a legislative act and rules implemented pursuant to authority delegated by that act. The findings that *Croson* requires are legislative, and implicitly must precede the legislative act. Moreover, as discussed above, the findings are necessary to enable the legislature itself, and then administrative agencies, to narrowly tailor the affirmative action remedy. *Croson*, supra, 109 S.Ct. at 728. The Defendants are not the Florida Legislature. The findings cannot be supplied by the executive branch at a later time when the legislative act is challenged in court.

The *Croson* decision rather clearly indicates that when a state or local government independently enacts race-conscious remedial legislation, it must make its own

findings of prior racial or ethnic discrimination within its own jurisdiction, findings that should be particularized to the industry in question, and cannot rely upon national findings made by Congress. *Croson*, supra, 109 S.Ct. at 723-728.

For these reasons, with respect to the operation of the challenged statute and rules to the Florida highway construction contracts funded entirely by state funds, the Plaintiffs have shown that there is a substantial likelihood that they will be successful on the merits. Indeed, to this extent summary judgment should be entered in favor of the Plaintiffs.

Florida highway construction contracts funded in part with funds provided by the federal government, however, pose much more difficult questions for the court. The Defendants argue that the Florida statute and implementing rules constitute a subsidiary part of the federal program, and thus Plaintiffs' claims, to that extend, are governed by *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

The Plaintiffs, on the other hand, argued that after the *Croson* decision, a state's actions must be subjected to strict scrutiny even though induced by, or enacted to comply with, a federal program to obtain federal funds. In part, Plaintiffs argue that their challenge to the Florida statute and implementing rules is not a "facial" challenge, but is a challenge to the way Florida has "applied" the federal mandate.

Plaintiffs' characterization of their claims is not persuasive. In the *Fullilove* case, the plurality opinion stated that before the Court was only a facial challenge to the

federal legislation. 448 U.S. at 453, 100 S.Ct. at 2762. The Court pointed out that the petitioners therein had "not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case," 448 U.S. at 480, 100 S.Ct. at 2776, and noted it was " . . . not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases." 448 U.S. at 486, 100 S.Ct. at 2779.

The case at bar is the same. The Plaintiffs have presented extensive evidence and argument that the Florida Defendants have made improper choices in the implementation of the MBE program. For example, it has been asserted that the Defendants have not properly allowed waivers of the MBE goal on particular contracts when bidders were unable, in good faith, to meet the goal, and it has been asserted that the Defendants have improperly failed to seek exceptions from the USDOT for the Florida program. The Plaintiffs have also argued and presented some evidence concerning harm to individual prime and subcontractors. But the Plaintiffs have not alleged that any individual Plaintiff was harmed in any *specific instance* on a particular contract or opportunity to bid by the manner in which the Defendants have applied the federal requirements, and have not sought individualized relief with respect to application of the Florida statute or regulations to an individual Plaintiff with respect to a particular contract or opportunity to bid. Damages are

not sought in this case. In short, there are no allegations that the Florida program has been applied in unconstitutional manner to a particular Plaintiff having standing to make that claim.

Thus, it must be concluded that this case only concerns the facial validity of the Florida statute and implementing regulations.

Determination that it is a facial challenge, however, does not dispose of the question of whether this case must be decided by the *Croson* or the *Fullilove* decision. A resolution of that question necessitates a broader examination of the different kinds of "affirmative action" programs that exist.

In determining the validity of affirmative action the Supreme Court appears to have made critical distinctions between judicial remedies following favorable decisions for plaintiffs in judicial cases, legislative remedies enacted by state and local governments, and legislative remedies enacted by Congress.

Judicial remedies are inherently tied to specific findings (or at least allegations) of past violations by the defendants of the equal protection clause since liability (or settlement in the face of allegations) is a condition precedent to the remedy.

Legislative affirmative action remedies enacted by state and local governments, as discussed above, are subjected to strict scrutiny because all race-conscious laws must be measured against the equal protection clause of Section 1 of the Fourteenth Amendment. That is the fundamental teaching of *Wygant* and *Croson*.

But the Fourteenth Amendment also contains Section 5 that grants to Congress the responsibility to "enforce, by appropriate legislation," the equal protection clause in Section 1. Thus, while the Fourteenth Amendment is a limitation upon the powers of the states, it is an enlargement of the power of Congress. *Ex parte Virginia*, 100 U.S. 339, 345 (1880), quoted with approval in *Croson*, supra, 109 S.Ct. at 719 (plurality opinion, Justices O'Connor, White, and Chief Justice Rehnquist).

While a state, as a state, clearly has authority within its police power to enact laws that affirmatively remedy the current effects of discrimination within the state's jurisdiction, *Croson*, supra, 109 S.Ct. at 720 and n. 2, when it does so, it confronts the limitation upon its powers by Section 1 of the Fourteenth Amendment intemperate by the grant of power in Section 5 of the Fourteenth Amendment.

In *Fullilove v. Klutznick*, supra, the affirmative action enactment was Congressional in origin. In *Fullilove*, Congress had enacted the Public Works Employment Act of 1977. That Act appropriated funds to the states for use in public works projects. The portion of the Act challenged in the *Fullilove* case was a provision that unless the Secretary of Commerce determined otherwise, no grant under the Act would be made unless the applicant gave assurance that 10% of the federal funds would be expended upon minority business enterprises. A minority business enterprise was defined by the Act using explicit racial and ethnic classifications.

The plurality opinion in *Fullilove* written by Chief Justice Burger determined that while a "program that

employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." 448 U.S. at 472, 100 S.Ct. at 2771.

Fullilove proceeded following two analytical steps. First, it determined whether the objectives of the legislation were within the power of Congress. Second, it determined whether the means to achieve the Congressional objectives were constitutionally permissible. 448 U.S. at 473, 100 S.Ct. at 2772.

Congressional power was readily located in the spending clause, the commerce clause, and Section 5 of the Fourteenth Amendment. 448 U.S. at 474-479, 100 S.Ct. at 2772-75. In particular, the plurality opinion found that Section 5 of the Fourteenth Amendment empowered Congress to enact such legislation without the need to find that the evil to be remedied was in fact an equal protection violation. It was enough that *the Court "could perceive a basis* upon which Congress could reasonably predicate a judgment" that the matter remedied by the legislation "would discriminate . . . in terms of access to the provision or administration of governmental programs." 448 U.S. at 477, 100 S.Ct. at 2774. With respect to the *quality* of such evidence, the plurality opinion stated:

> Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings.

448 U.S. at 478, 100 S.Ct. at 2774.

Thus, it is evident that the Court in *Fullilove* was substantially more deferential to the Congressional perception of the evil to be remedied than it was to the like perception of the City of Richmond in the *Croson* case.

But the difference in the standard of judicial scrutiny between the two cases becomes even more apparent when one lists the "evidence of discrimination" before Congress which the Court in *Fullilove* determined to be sufficient for the exercise of Congressional remedial power under Section 5 of the Fourteenth Amendment, compared to the rejection of such evidence in *Croson* when Section 5 was not operative. The *Fullilove* plurality opinion relied upon the following:

> 1. In 1976, less than 1% of all federal procurement was concluded with minority business enterprises, although minorities comprised 15-18% of the population. Only 0.65% of the nation's businesses' gross receipts in dollars was realized by minority businesses, though minorities comprised 16% of the population.[6] 448 U.S. at 459 and 465, 100 S.Ct. at 2765 and 2768.

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[6] *Croson* determined that comparison of the percentage (0.67%) of the prime contracts awarded by the City to minority firms with the percentage (50%) of the minority population in the City of Richmond was "misplaced" because the relevant comparison would be to the number of minority persons qualified to be awarded a prime contract, citing *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-308, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977), a case involving not legislative remedies for perceived equal protection problems, but a suit by the United States on behalf of teachers seeking a judicial remedy for alleged equal protection violations in employment decisions.

2. Only 3.0% of the nation's 13 million business were owned by minorities, though minorities comprised 16% of the population.[7] 448 U.S. at 465. 100 S.Ct. at 2768.

3. Minority businesses were handicapped by deficiencies in working capital, inability to obtain bonds, lack of a past reliable work record, lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before formal advertising process, and discretion exercised by procurement officers to disfavor minorities.[8] 448 U.S. at 463, 100 S.Ct. at 2767.

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[7] The Court in *Croson* determined that evidence that minority business enterprise membership in local contractors' associations in the Richmond area was extremely low was not evidence of a prima facie case of discrimination, noting that past societal discrimination in education and economic opportunities, as well as black career and entrepreneurial choice, might have caused the extremely low membership rate. 109 S.Ct. at 726.

[8] While it is apparent from a review of this list that some of these deficiencies might originate from causes other than racial discrimination, it is also apparent that it is likely that racial discrimination as a cause of such deficiencies probably occurred as much in education, housing, and in arenas other than the contracting industry in Richmond itself. The Court in *Croson* wrote: "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." 109 S.Ct. at 727.

> 4. The legislative objectives of the provision challenged had to be considered against a background of ongoing efforts by Congress "directed toward deliverance of the century-old promise of equality of economic opportunity."[9] 448 U.S. at 463, 100 S.Ct. at 2767.
>
> 5. Past discriminatory systems had resulted in present economic inequities in the enjoyment of business opportunities by minority businesses. The effect of past inequities stemming from racial prejudice have not remained in the past.[10] 448 U.S. at 465, 505-507, 100 S.Ct. at 2768, 2788-2789.

Reciting the evidence that Congress had with respect to minority businesses, the Court in *Fullilove* held that

> Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination.

448 U.S. at 477-78, 100 S.Ct. at 2774.

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[9] In *Croson* the Court wrote: " . . . [T]he mere recitation of a 'benign' or legitimate purpose for a racial classification, is entitled to little or no weight. . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." 109 S.Ct. at 724.

[10] The Court in *Croson* determined that a general assertion of prior discrimination by the proponent of the legislation was of little probative value in establishing identified discrimination in the Richmond construction industry, that "when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals," and that "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." 109 S.Ct. at 725.

Having found that Congress had the authority to enact the questioned legislation, the plurality opinion in *Fullilove* turned its attention to the means used. Here the Court noted that "in no matter would we pay more deference to the opinion of Congress that in its choice of instrumentalities to perform a function that is within its power."[11] 448 U.S. at 480, 100 S.Ct. at 2775. Again, however, it noted that because the equal protection clause of Section 1 of the Fourteenth Amendment was implicated, "careful judicial evaluation" was needed "to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." 448 U.S. at 480, 100 S.Ct. at 2775-76.[12]

The Court implied that a federal court's remedial power is limited: in the case of a court, a finding of an equal protection violation precedes the remedy, and the remedy necessarily is inextricably tailored to fit the nature and extent of the violation. See 448 U.S. at 483, 100 S.Ct. at 277. The power of Congress, however, to fashion remedies pursuant to Section 5 of the Fourteenth Amendment, and in so doing, to induce state action, is different from the remedial power of a court:

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[11] The Court stated that "Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems." 448 U.S. at 486, 100 S.Ct. at 2779.

[12] Justice Powell, concurring, would have the court review to determine only whether "the means selected are equitable and reasonably necessary to redress of identified discrimination." 448 U.S. at 510, 100 S.Ct. at 2791.

> Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only *may induce voluntary action* to assure compliance with existing federal statutory or constitutional anti-discrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, *authorize and induce state action to avoid such conduct*. (E.S.)

448 U.S. at 483-484, 100 S.Ct. 277.

The Court pointed out that a state's induced compliance with a Congressionally determined remedial measure may well involve state action *without* a prior determination of an equal protection violation. " . . . [W]e have held that a state may employ racial criteria that are reasonably necessary to assure *compliance with federal voting rights legislation*, even though the state action does *not entail the remedy of a constitutional violation*." (E.S.) *Fullilove*, supra, 448 U.S. at 483, 100 S.Ct. at 2777, citing *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 147-165, 97 S.Ct. 996, 1000-1009, 51 L.Ed.2d 229 (1977).

Even though the Court in *Fullilove* did not have before it a challenge to the application of the minority business program in particular cases, and even though the Court was guided by deference to the authority of Congress under Section 5 of the Fourteenth Amendment

to enact remedies, the plurality opinion nonetheless held that

> . . . the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

448 U.S. at 487, 100 S.Ct. at 2779.

The Court then conducted a review of the MBE program at issue. While the Court later characterized this review as a "most searching examination,"[13] it is apparent that the review was somewhat less stringent than the review conducted in the *Croson* case. The Court made the following observations about the MBE program challenged in *Fullilove*:

> 1. There was administrative scrutiny to identify and eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines.
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> 2. A complaint procedure existed to eliminate spurious MBE's.
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> 3. Waiver was allowed to avoid dealing with an MBE who attempted to unfairly exploit the program by charging a higher price not attributable to the present effects of past discrimination.

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[13] The Court eschewed, however, adoption of any of the modes of analysis of *University of California Regents v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978).

> 4. Waiver or partial waiver was allowed to grantees who could demonstrate that their best efforts would not succeed in achieving the 10% target for minority firm participation.
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> 5. Since the 10% minimum goal constituted only 0.25% of the nearly $170 billion spent on construction in the United States in 1977, the loss to nonminorities was "relatively light." 448 U.S. at 484 and n. 72, 100 S.Ct. 2778 and n. 72.

448 U.S. at 487-488, 100 S.Ct. at 2779-2780.

The Court concluded that the fact that " . . . use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied." 448 U.S. at 489, 100 S.Ct. at 2780.

In summary, the *Fullilove* Court did not apply "strict scrutiny" to a Congressionally fashioned remedy enacted pursuant to Section 5 of the Fourteenth Amendment for Congressionally perceived effects of past denial of equal protection, and the *Croson* plurality, speaking through Justice O'Connor, so found. 109 S.Ct. at 717.

The *Croson* decision analyzed the *Fullilove* case to determine whether the *Fullilove* standard of review should be applied to an affirmative action program independently enacted by a city. While that analysis of *Fullilove* was not in the context of analysis of a federal program at the state level, the comments of the Justices in *Croson* provide guidance to the court in the case at bar by implication and inference.

Writing for the plurality, Justice O'Connor found that *Fullilove* had held that "Congress *could mandate state and local government compliance with the set-aside program* under its § 5 power to enforce the Fourteenth Amendment." 109 S.Ct. at 718. (E.S.) (citation omitted). This was so because pursuant to its unique powers under Section 5 of the Fourteenth Amendment, Congress could "authorize and induce state action to avoid such conduct [conduct violative of antidiscrimination provisions]." *Id.*, quoting *Fullilove*. The power to "mandate state and local government compliance" was further justified, said Justice O'Connor in *Croson*, because *Fullilove* found that the assumption that past discrimination had impaired the competitive position of minority businesses, if incorrect, could be remedied administratively because there was an administrative procedure for waiver if a minority business sought to charge an unreasonable price, that is, one not higher due to the present effects of prior discrimination. 109 S.Ct. at 718.

If one were to stop here, and go no further, it would appear that Justice O'Connor in dicta reads *Fullilove* as applying a deferential standard of review to the *entire* federal spending program, *all the way to spending implementation by individual states*, so long as at the state level there is a reasonable administrative procedure for waiver to tailor the remedy so as to remedy present effects of prior discrimination in fact.

The Plaintiffs have relied upon later comments made by Justice O'Connor in *Croson* for the proposition that a state-enacted affirmative action program, even though induced by a federal program, must be subjected to strict scrutiny because it does not have the privilege of tagging

along with Congressional findings of prior discrimination in the construction industry. Justice O'Connor wrote that the Court found that the probative value of Congressional findings as a basis for the *independent* legislative decision of the *City* was "extremely limited." It was in that context that Justice O'Connor stated:

> By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market to market area. See *Fullilove*, 448 U.S., at 487, 100 S.Ct., at 2779 (noting that the presumption that minority firms are disadvantaged by past discrimination may be rebutted by grantees in individual situations).
>
> Moreover, as noted above, Congress was exercising its powers under § 5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivision may take remedial action when they possess evidence that *their own* spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject *to enact* a set-aside program, the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity. (E.S.)

109 S.Ct. at 726-727. Thus, in context, Justice O'Connor was only saying that when a state or city enacts race or

ethnic explicit remedial programs *on its own*, it cannot rely upon Congressional findings.

From the text of the *Croson* decision, therefore, one cannot conclude, as argued by the Plaintiffs, that the relaxed standard of *Fullilove* applies only to the initial enactment of a federal program governing federal spending, but that the strict scrutiny of *Croson* must apply to implementation of that program by a state. Instead, Justice O'Connor's opinion for a plurality of the Court, albeit in dicta, appears to read *Fullilove* as applying the *Fullilove* standard to a state's implementation of a federally mandated race-conscious remedial program.

This reading of *Fullilove* is consistent with *Fullilove* itself. In *Fullilove*, the Court evidenced clear awareness that the federal program, as a spending program with strings attached, would induce state action, and that such induced state action *was* the federal program as intended by Congress.

> The MBE program . . . primarily *regulates state action in the use of federal funds* voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. (E.S.) 448 U.S. at 479, 100 S.Ct. at 2775.
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> . . . [W]here Congress has authority to declare certain conduct unlawful, it may, as here, *authorize and induce state action* to avoid such conduct. (E.S.) 448 U.S. at 484, 100 S.Ct. at 2777.

Whether *Fullilove* will be revisited and altered by the Supreme Court cannot be determined by this court. This court must follow that decision as best it can as long as it is the law.

The parties have relied upon a number of other decisions from courts other than the Supreme Court, but for the most part those decisions have been unpersuasive primarily because the cases have involved pure *Croson* circumstances of state or local affirmative action enactments unconnected with a federal mandate.[14]

Three cases, however, are closely analogous to the case at bar.

This court previously relied upon *H. K. Porter Co. v. Metropolitan Dade Co.*, 825 F.2d 324 (11th Cir. 1987), when it denied the Plaintiffs' first motion for preliminary injunction. Since that time, the Supreme Court vacated that decision, ___ U.S. ___, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989), and the Eleventh Circuit has remanded to the trial court on the motion of the appellant, unreported order dated April 13, 1989. The case thus no longer exists as precedent.

At least one court has considered the Supreme Court's vacation of the *H. K. Porter Co.* case as a neutral factor in its analysis. *Milwaukee County Pavers Assn. v.*

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[14] An example of a decision involving a state program independent of a federal mandate is *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987). Another decision relied upon by the plaintiffs is *S. J. Groves & Sons Company, et al. v. Fulton County*, slip opinion, C82-1895A, N.D. Ga., March 31, 1987, and April 22, 1988. Doc. 47, Exs. A and B. That decision, however, concerned a challenge to USDOT regulations promulgated under earlier federal statutes which did *not* mandate a 10% goal. In its April 22, 1988, opinion, the *Groves* court indicated that its order "did not govern" with respect to USDOT regulations promulgated pursuant to the STAA of 1982. *Groves*, pp. 3, 7, and 10.

Fiedler, slip opinion, 89-C-0177-C, W.D. Wisc., April 7, 1989, pp. 15-16 n. 3, attached to doc. 60. The *Fiedler* decision is apparently the only decision extant (and not vacated) that concerns the precise question now before this court.

In the *Fiedler* case, Wisconsin had enacted legislation quite similar to the Florida statute at issue in this case. The Wisconsin statute was in response to the STAA of 1982 and the STURAA of 1987 in order to qualify for federal highway construction funds. Of the $300 to $350 million spent by Wisconsin on highway construction each year, the federal share was about $200. Receipt of the federal funds was contingent upon compliance with federal statutory and regulatory requirements concerning disadvantaged businesses. *Fiedler*, pp. 3-6.

Unlike the Plaintiffs in this case, the Plaintiffs in the *Fiedler* case did not challenge the basic state program, but instead challenged a secondary statutory program. The secondary program set aside $4 million to be awarded in part to minority businesses, provided training, and required each prime contractor to make a good faith effort to award at least 20% (rather than 10%) of the total contract amount to disadvantaged businesses. The standards and procedures of this secondary program were identical to the basic state program implementing the STURAA of 1987, and funds expended under the subsidiary program were intended to be counted toward the 10% goal established by the federal act. The program was presented to and approved by the USDOT. *Fiedler*, pp. 6-12.

The court in *Fiedler* had previously issued a preliminary injunction, but reconsidered that ruling based upon Wisconsin's argument that their secondary program was only a subsidiary of the federal program. The court determined that the *Fullilove* case was still good precedent after *Croson*, and that the issue was whether the state program could be considered to be a subsidiary of a federal program. *Id.*, pp. 14-16 and n. 3. The court noted that stringent standards of *Croson* would not apply if the state program was only a subsidiary of a federal program, and that the standards of *Fullilove* would apply in that case. If it was merely a subsidiary, then the court concluded that the less stringent standard of *Fullilove* would apply.

The court in the *Fiedler* case then reviewed the federal statutes and regulations and the Wisconsin statutes and regulations, determining that "the integration of the federal and state program is essentially total." *Fiedler*, p. 25. The court noted that the definitions were identical, the criteria were identical, and funds expended under the state program counted toward meeting the federal 10% goal. *Id.*, pp. 25-26. The fact that Wisconsin had been given several options by Congress (forego $200 million in federal funds, or achieve the 10% goal some other way, or seek a waiver) did not compel the conclusion that the state program was a state program standing alone to be analyzed using *Croson* standards. *Id.*, pp. 29-30. The court concluded that the state program was in fact a subsidiary of the federal program. *Id.*

The *Fiedler* court then addressed the application of the *Fullilove* standards. The *Fiedler* court determined that the *Fullilove* standard involved two tests: whether there

were some Congressional findings of past discrimination necessitating remedial action, and whether the remedial program was narrowly tailored to achieve its ends. *Id.*, p. 18.

Because the state program was a subsidiary of a federal program, the *Fiedler* court determined that the state could "rely" upon the findings of Congress as to discrimination as the basis for the remedial actions of the state.[15] *Fiedler*, p. 30. The court distinguished the passages in *Croson* wherein the Supreme Court ruled that the City of Richmond could not "rely" upon the findings of Congress as applicable only where the city or state acts on its own, independent of a federal mandate. *Id.*, p. 31.

The *Fiedler* court then examined the Congressional findings of discrimination that underlay the enactments of the STAA of 1982 and STURAA of 1987. It noted that the federal statutes were not challenged, but were examined "only to determine whether they [the Congressional findings] provide a constitutionally sufficient foundation for the challenged Wisconsin law." *Fiedler*, p. 31 and n. 8. The court reviewed the legislative history of these two federal acts, and found that provisions therein were based upon findings that were relied upon in the enactment of the Public Works Employment Act of 1977, the

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[15] As will be discussed ahead, this appears to be an incorrect way to analyze the problem. If the state is merely implementing a federal mandate, it has relied upon nothing. It simply has complied. The reliance was by Congress in establishing the mandate in the first place. Since the state was merely complying, it had no reason to refer to findings of discrimination of any sort, whether its own independent findings or the findings of Congress.

Act which the *Fullilove* decision of the Supreme Court found to have been supported by adequate findings. The court concluded that "Congress had before it ample evidence of past discrimination in the construction trade and could constitutionally enact race-conscious remedies and impose them on the states." *Id.*, pp. 36-37. Inferentially, then, the court found that Wisconsin could "rely" upon these findings as it sought to comply with the federal mandate.

The *Fiedler* court then turned to the last test facing the Wisconsin program: whether it was "tailored to the problem that has been identified." *Fiedler*, p. 37. It concluded that only an equitable and reasonable tailoring is probably required, rather than a "narrow" tailoring. *Id.*, p. 37 n. 9. It then identified three aspects of the test of tailoring: that the degree of preference be tied to effects of past discrimination, that there have been prior consideration of race-neutral alternatives, and that there be no unfair burden on innocent nonminorities. *Id.*, p. 38.

Applying these tests to the federal program under the STURAA of 1987, the *Fiedler* court found that it contained virtually all of the limitations noted with favor in *Fullilove* with respect to the Public Works Employment Act of 1977: the program under the STURAA of 1987 operated prospectively, waiver was available, eligibility criteria were rebuttable, third parties could challenge eligibility, the state program was of limited duration, and the 10% goal was the same percentage upheld in *Fullilove*. *Fiedler*, pp. 39-40. In effect, the *Fiedler* court thus found

that the state program need not be tailored any more narrowly than the federal program had been tailored.[16]

With respect to the question of undue burden upon nonminorites, the *Fiedler* court had before it a set-aside that was only 1.5% of the total construction budget, and determined that individual nonminority contractors had not shown the loss of particular contracts having characteristics making them invaluable to that individual contractor. *Fiedler,* p. 41.

The court in *Fiedler* thus concluded that the Wisconsin set-aside program was sufficiently tailored to meet the constitutional standards of *Fullilove.*

A third decision (one that predated the *Croson* case) is *Tennessee Asphalt Company v. Farris,* slip opinion, 3-85-1176, M.D. Tenn., April 19, 1987. Doc. 55, Ex. N. The challenge in that case was to a portion of the STAA of 1982, and the defendants included the Secretary of the USDOT and Tennessee DOT officials responsible for implementation of the Tennessee program. The court selected strict scrutiny as its standard of review. *Farris,* p. 15. A compelling interest was found in the same manner as found by the *Fiedler* court: the legislative history of the Small Business Act relied upon by *Fullilove.* It is noteworthy that the court looked only to a compelling interest for Congress, not for the State of Tennessee. *Id.,* p. 17.

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[16] "The contested Wisconsin statute is intended to improve the state's implementation of the federal program. It is narrowly tailored to meet that end and thus is also narrowly tailored to remedy the discrimination Congress has identified." *Fiedler,* p. 40.

The court then reviewed the question of whether the federal statute and its implementing regulations were narrowly tailored. Again, apparently the court did not examine the state laws. Implementing the federal program. *Farris*, p. 18. The court noted the 10% goal was the same as the goal found to be within the scope of Congressional discretion in *Fullilove*. *Id*. It found that Congress was then reviewing the continuation of the STAA, thus indicating that the program would not be indefinite, that the Tennessee DOT had satisfied its goal each year, indicating that the goal was not grossly disproportionate to the number of available minority contractors, that waiver of the annual goal was available, and that waiver of the goal by contract was available. *Id*., p. 19.

The *Farris* court then considered the impact of the program in Tennessee upon innocent parties. It noted that when *Fullilove* considered this question, the Court compared the percentage of MBE set aside to all construction in the United States, not just to federally funded construction work, and concluded that the proper method to make a similar comparison would be to compare the DBE set aside in Tennessee as a percentage of all highway construction regardless of funding source. *Farris*, pp. 20-23. From this comparison it found the impact upon innocent parties to be not impermissible. *Id*.

The *Farris* court thus entered summary judgment in favor of the defendants.

A final case must be mentioned, for it provides significant guidance for resolution of the claims in this case. In *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), the Supreme Court considered a

claim, among others, that school officials and children in northern Mississippi counties were denied equal protection of the laws by denial of economic benefits of public school lands granted by the United States to the State of Mississippi. The Court noted that a "crucial consideration" was whether federal law required the challenged state action. The Court wrote:

> *If, as a matter of federal law, the State has no choice in the matter,* whether the complaint states an equal protection claim depends on *whether the federal policy is itself violative* of the [Equal Protection] Clause. *If it is,* the *State may properly be enjoined* from implementing such policy. (E.S.)

106 S.Ct. at 2946. In a footnote, the court noted that if the lands had come to the state in trust, with the state as trustee, the state would be bound to comply with the terms of the trust. *Id.* at 2946 n. 18.

C. Analysis of the Florida statute and rules

Florida enacted the predecessor to § 339.0805 immediately following the Congressional enactment of the STAA of 1982, and adopted verbatim the goal of 10% and the race-conscious definition of the new federal law. Florida previously had a minority business "program," but did not adopt a 10% goal until it became necessary due to the STAA of 1982 to receive the millions of dollars in federal highway construction funds appropriated by Congress. When Congress amended the race-conscious definition in 1987 with the enactment of the STURAA, Florida immediately changed its own statute, now § 339.0805, to adopt the same race-conscious definition verbatim.

Regulations adopted by the United States Department of Transportation implementing the 1987 STURAA provide that the race-conscious definition of persons presumed to be socially and economically disadvantaged is rebuttable. Florida adopted a rule also making the presumption rebuttable.

USDOT regulations state that recipient states must meet the 10% goal, absent USDOT Secretary waiver. USDOT regulations further provide that each state recipient of federal funds must submit its goal to the Secretary of the USDOT, and a state must justify any goal less than 10%. USDOT regulations explicitly state that the national goal of 10% "will be achieved if recipients under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent." 49 C.F.R. § 23.61. By statute, Florida has established an overall goal of 10%, subject to waiver by the Defendant. Florida has not had occasion to seek a waiver from the USDOT of the federal 10% goal because it has met the 10% overall goal in all years since 1983.

Absent exception, the USDOT can terminate federal highway funds if a recipient state fails to have an approved MBE program, fails to have an approved overall goal, or fails to meet such goal annually.

By USDOT regulation, a state must establish a procedure whereby third persons can challenge the "socially and economically disadvantaged" status of a person. Florida has provided that procedure by rule. Florida has also provided that any person adversely affected by Florida's decision may appeal to the USDOT, and the USDOT regulations provide for such an appeal.

The federal statute and regulations do not regulate the manner in which a recipient state may set goals for the award of individual contracts. Florida has established rules so that goals are set for the award of individual contracts upon consideration of the type of work required, subcontracting opportunities, the dollar amount, the number of certified DBE's likely to be available, and the past experience of the FLADOT in meeting its goals. Florida in fact has set goals less than 10% on a substantial number of contracts.

The federal statute and regulations do not regulate whether a state must grant waivers to bidders on individual contracts. Florida has adopted rules establishing procedures for bidders to obtain waivers where the contract goal cannot be met despite good faith efforts by the bidder. The inquiry established by the rule into the "good faith" of bidders explores the question of the availability of certified DBE's and the efforts of the bidder to divide the work in reasonable ways and to help the DBE.

The inescapable conclusion that must be drawn from the foregoing is that Florida did not enact § 339.0805, Fla. Stat., or its predecessor in 1983, as an independent state legislative act. Florida's statute and rules at every step dovetail with the federal statute and regulations. While it is technically true that Florida could have refused to enact § 339.0805 and the implementing rules, in reality it had no choice because the penalty for such refusal was too severe: the federal highway subsidy is too important to th Florida highway construction budget. The federal program was in fact a federal mandate, and the state statute and rules challenged in this case are merely the

end result of, and thus necessarily a part of, the federal program originally intended by Congress.

The Florida statute and rules, therefore, are in fact merely an extension of the federal program.

Stated another way, the federal highway funds do not come to the State of Florida in fee simple. They come in "trust" and Florida's use of the funds necessitates strict compliance with the Congressional mandate regarding use of such funds.

For these reasons, the effort of the Plaintiffs to enjoin the Florida statute and rules necessarily involves a determination of whether the *federal* statute and regulations constitute a denial of equal protection. *Papasan v. Allain*, supra, 106 S.Ct. at 2946 and n. 18.

A definitive ruling as to the constitutionality of the federal statute and rules cannot be made in this case because necessary federal defendants are not present to defend the federal program. The manner in which the *Fiedler* court considered the question of whether the state had properly "relied" upon Congressional findings of discrimination, and its analysis of the sufficiency of those findings, appears to have been an indirect adjudication of the constitutionality of the federal statute, and may have been incorrect since federal defendants were not joined in that case.

There is another reason for not following the *Fiedler* court's analytical premise that a state might "rely" upon Congressional findings of discrimination to defend its own statute. Since the Florida statute was not the independent legislative act of the Florida Legislature, it did

not independently identify the evil to be remedied either through its own investigation in Florida or in reliance upon Congressional findings of prior racial discrimination in the construction industry. It simply complied with the federal requirements that were tied to receipt of these important funds. It makes no sense to subject the state's legislative acts to the *Croson* standard, including the necessity for the state legislature to have recorded extensive findings of prior racial or ethnic discrimination in the highway construction industry in Florida, when the state legislative act was solely in compliance with legislative choices made in Congress.

Notwithstanding the fact that the Plaintiffs have not joined any federal defendants, and the court would be treading upon shaky ground were it to adjudicate the STAA of 1982 or the STURAA of 1987 to be unconstitutional absent such appropriate parties to take up the defense, nonetheless such questions should be considered with respect to Plaintiffs' motion for preliminary injunction and potential joinder of such defendants. Joinder of federal defendants should not occur unless the Plaintiffs have shown a likelihood of success on the merits sufficient to merit that joinder, to merit a preliminary injunction, or to determine whether the pending motion for summary judgment should be in part denied. Otherwise, such joinder would not be necessary.

For this purpose only, it may be observed that the courts in *Fiedler* and *Farris* have correctly shown that judged by the standards of *Fullilove*, Congress made ample findings of prior discrimination in the construction industry when it enacted both the STAA of 1982 and the STURAA of 1987. Additionally, it is noted that in the

enactment of the STURAA of 1987, Congress explicitly relied upon its prior findings in the enactment of the STAA of 1982, the Public Works Act of 1977, and the *Fullilove* decision. Senate Report 100-4, January 27, 1987, Senate Committee on Environment and Public Works, supra. Deeper inquiry by the court into the basis of such findings would be contrary to the standards of *Fullilove*.

Since Florida's legislative interest in the enactment of the Florida statute was simply to obtain federal funds in the manner intended by Congress that such funds should be obtained, and since Florida had no occasion to identify the evil to be remedied, it is difficult to scrutinize the Florida program upon facial constitutional attack for tailoring more narrow than the tailoring provided by Congress. The Florida Legislature had no occasion to, and did not, take the measurements of a narrower evil, and thus had no legitimate basis to engage in narrower tailoring.

Thus, questions of narrow tailoring are answered in this case as the *Fullilove* Court did, by reference only to the evil identified by Congress and by examination of the degree of administrative flexibility and burden upon nonminorities in the Florida program.

Florida's definition of "socially and economically disadvantaged individuals" is identical to the federal definition, and Florida's 10% annual goal is also identical to the federal goal. Florida did not expand either beyond the limits set by Congress. Moreover, Florida adopted the federal provision that the Secretary of the Florida Department of Transportation has authority to allow (and seek federal approval of) an exception to the annual 10% goal. Florida adopted all of the other administrative exceptions

of the federal program as well. By Florida rule, the presumption that a person is "socially or economically disadvantaged" is rebuttable, and Florida has established a procedure for any third person to challenge such status, with appeal to the USDOT.

Finally, Florida adopted administrative exceptions not adopted in the federal program. By rule, goals are set by individual contract letting, and these goals consider the type of work required, subcontracting opportunities, and the number of certified DBE's likely to be available. Florida has also adopted a rule permitting bidders on individual contracts to obtain a waiver of a goal on a specific contract based upon the actual availability of disadvantaged business enterprises for that contract.

While it is true that the Florida rules do not specifically provide for an administrative procedure for the state to decline to use a minority bid that contains a cost that does not reflect the present effects of past discrimination (a point emphasized both in *Fullilove* and *Croson*), Florida does have a rule that allows a third party to challenge directly the status of a person as being "socially and economically disadvantaged." An affected nonminority or the state itself could by this procedure determine that an individual is not in fact "socially and economically disadvantaged." Social and economic disadvantage is a condition shared by many citizens of Florida, regardless of race. But that status also could originate from past racial or ethnic discrimination, and thus would in fact be the current effects of such past discrimination. If a person is not socially and economically disadvantaged, it would be clear that such person is not suffering

from the present effects of prior racial or ethnic discrimination. The Florida procedure, therefore, provides a better, and more direct safeguard, than the procedure found to have been important in *Fullilove* and *Croson*.

While the Florida statute and rules are not explicitly limited in duration, the Florida statute was enacted and amended in obvious lock-step with the federal statute as it has been considered by Congress, enacted, reconsidered, and re-enacted. Section 106 of the STURAA of 1987 applies to appropriations only through 1992. Thus, Congress must revisit the question in a few years. If Congress were to rescind its program, the Florida program would probably end as well. If the court enters partial summary judgment in favor of the Plaintiffs as recommended in this report and recommendation, continuation of the Florida program absent a federal mandate would require independent findings of discrimination by the Florida Legislature. Thus, the Florida program as presently constituted cannot be said to be of unlimited duration.

The impact upon nonminorities of the Florida program may be larger than that in *Fullilove*. From the record it appears that in FY 1987-88 and to May, 1989, the total highway construction expenditure in Florida was $813.8 million, and of this, $571.9 million involved participation with federal funds. One cannot tell what portion of the $571.9 million was federal money. While it is unlikely, if one assumes that all of that money was federal money, and further assumes that about 8% of the $571.9 million of federal money under the program will go to minority contractors and 2% will go to women, that portion (8% of $571.9 million) is about 7% of the total expenditure of

$813.8 million. Assuming that Florida determined to satisfy the federal goal by contracting entirely with minority general contractors, if it did so, 7% of total state highway construction expenditures would go to 4.6% of the certified general contractors, those which are minority businesses, a share disproportionate by 2.4%. (The disparity is probably smaller since it is unlikely that all of the $571.9 million was federal money.) While 2.4% is not an insignificant loss to nonminority general contractors, the impact is not so great that the Florida statute is, for that reason, constitutionally infirm. As pointed out by the Court in *Fullilove*,

> It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a "sharing of the burden" by innocent parties is not impermissible.

448 U.S. at 484, 100 S.Ct. at 2778. While the impact in *Fullilove* was only 0.25%, the impact in Florida cannot be said to be an inequitable or unreasonable "sharing of the burden."

Thus, the Florida statute and implementing regulations clearly meet the standards of tailoring required in the *Fullilove* case, as well as *Fiedler* and *Farris*.

IV. Conclusion

For these reasons, partial summary judgment should be entered in favor of the Plaintiffs with respect to Florida highway construction contracting that is not funded pursuant to the STAA of 1982 or the STURAA of 1987. A declaratory judgment should be sufficient. In June, 1989,

the Defendants voluntarily abated the minority goal program with respect to these state-funded contracts. An injunction would appear to be unnecessary. A partial grant of summary judgment renders that part of the motion for preliminary injunction moot.

To the extent that Plaintiffs seek summary judgment regarding highway construction contracts funded through the STAA of 1982 or the STURAA of 1987, the motion should be denied. Since the denial of the motion is also a determination that the Plaintiffs have not shown a likelihood of success on the merits, that portion of the motion for preliminary injunction should be denied.

Accordingly, it is

RECOMMENDED that:

1. The court enter an order partially granting Plaintiffs' motion for summary judgment and declaring that § 339.0805(1), Fla. Stat., and the provisions of Ch. 14-78, *F.A.C.*, implementing that portion of the statute are violative of the equal protection clause of the Fourteenth Amendment to the extent that the statute and implementing rules apply to highway construction contracts administered by the Defendants and not funded by federal funds pursuant to either the STAA of 1982 or the STURAA of 1987.

2. The court enter an order denying the remainder of Plaintiffs' motion for summary judgment.

3. The court enter an order denying Plaintiffs' motion for preliminary injunction because it is mooted in part by the grant of partial summary judgment and because Plaintiffs have not demonstrated a substantial

likelihood of success on the merits as to the remainder of that motion.

4. Title 28 U.S.C. § 636 and Local Rule 27(B) of this Court permit any party to object to these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. Objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. Objections shall be filed with the Clerk of the Court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within ten (10) days after being served with a copy thereof. Failure to object to this report and recommendation prior to the district court's acceptance and adoption of the report and recommendation limits the scope of appellate review of factual findings. *U. S. v. Slay*, 714 F.2d 1093 (11th Cir. 1983), *cert. den.*, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984); *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

IN CHAMBERS at Tallahassee, Florida, this 10th day of July, 1989.

/s/ William C. Sherrill Jr.
WILLIAM C. SHERRILL, JR.
UNITED STATES MAGISTRATE

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provision

Amendment XIV, Constitution of the United States:

Section 1. Citizens of the United States.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

a. 42 U.S.C. § 2000d. Nondiscrimination in federally assisted programs.

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

b. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in

equity, or other proper proceeding for redress. . . .

c. 15 U.S.C. § 637(a)(5):

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

d. 15 U.S.C. § 637(a)(6):

Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual.

e. 15 U.S.C. § 637(d):

(1) . . . .

(2) The clause stated in paragraph (3) shall be included in all contracts let by any Federal agency. . . .

(3) The clause required by paragraph (2) shall be as follows:

"(A) . . . .

"(B) . . . .

"(C) . . . The term "small business concern owned and controlled by

socially and economically disadvantaged individuals" shall mean a small business concern –

"(i) which is at least 51 percentum owned by one or more socially and economically disadvantaged individuals . . . ; and

"(ii) whose management and daily business operations are controlled by one or more of such individuals.

The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to [subsection (a) of this section]. . . . "

f. Pub.L. 100-17 (STURAA of 1987):

Section 106. Authorization of Appropriations.

(c) Disadvantaged Business Enterprises. –

(1) General Rule. – Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts [appropriated by this Act and the STAA of 1982] . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions. –

. . . .

(B) Socially and Economically Disadvantaged Individuals. – The term

> "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) . . . except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.
>
> . . . .
>
> (5) Section 105(f) of the [STAA] of 1982 shall not apply to amounts authorized under such Act and obligated after the date of the enactment of this Act.

Florida Statutes

FSA § 339.0805 [Laws of Florida, Chapter 83-3, Section 58, as amended by Chapter 87-93; deleted language struck through and added language underlined]:

> Except to the extent that the Secretary of the Department of Transportation determines otherwise, not less than 10 percent of the amounts expended from the State Transportation Trust Fund shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals ~~as defined by section 6(d) of the Small Business Act, 15 U.S.C., section 637(d) and relevant subcontracting regulations promulgated pursuant thereto~~ as defined by the Surface Transportation and Uniform Relocation Assistance Act of 1987.

United States Regulations

a. CFR, TITLE 49, Subtitle A, Part 23, Subpart D, § 23.62:

"Socially and economically disadvantaged individuals" means those individuals . . . who are Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans. . . . Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged . . .

(a) "Black Americans," . . .

(b) "Hispanic Americans," . . .

(c) "Native Americans," . . .

(d) "Asian-Pacific Americans," . . . and

(e) "Asian-Indian Americans,". . . .

b. USDOT Order 4000.7A (March 6, 1987):

a. It is the policy of the Department of Transportation to encourage and increase the participation of businesses owned and controlled by minorities, including women, (MBEs) in contracts and projects funded by the Department. Economically and socially disadvantaged individuals, including women, have traditionally been underrepresented as owners and managers of businesses in this country. The executive and legislative branches of the federal government have long recognized the need to promote the development of businesses owned by the economically and socially disadvantaged to achieve

the goal of equal opportunity. To overcome the traditional underrepresentation of these groups in the business community, the federal government has used its procurement authority and its financial assistance programs to state and local governments as vehicles to assist minority business enterprises. Executive Order 11625 directs the Department of Commerce to provide technical and financial assistance to promote MBEs. Executive Order 11625 further requires that federal executive agencies develop comprehensive plans and programs to encourage minority business enterprise.

b. The Department of Transportation is firmly committed to fulfilling its responsibilities under this Executive Order and to meet the goal of greater MBE participation in contracts and projects funded by the Department, although this may result in some increased cost to DOT. To this end, DOT is requiring each of its operating elements and all aid recipients and their contractors to make strong affirmative action efforts designed to set and meet goals for increasing MBE involvement. These efforts will encompass all aspects of the procurement of supplies, equipment, construction and services, including professional services, concession contracts and bank deposits.

c. The Department recognizes that meaningful gains in the level of MBE participation can be achieved only with energetic enforcement of this order and the commitment of all DOT employees, grantees and

contractors to the goals of equal opportunity.

Florida Regulations

CHAPTER 14-78
PARTICIPATION BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS IN DEPARTMENT OF TRANSPORTATION CONTRACTS

14-78.001 General

14-78.0011 Time and General Procedural Requirements

14-78.002 Definition

14-78.003 General Responsibilities

14-78.005 Standards for Certification of DBEs

14-78.007 Procedure for Certification

14-78.008 Suspension or Revocation

14-78.0081 Federal Appeal Rights

14-78.009 Forms

14-78.001 General.

This rule chapter implements the Department of Transportation's policy that socially and economically disadvantaged individuals shall have the maximum opportunity to participate in the performance of contracts let by the Department for the construction, reconstruction or maintenance of transportation facilities.

14-78.0011 Time and General Procedural Requirements.

[Omitted]

14-78.002 Definitions.

Throughout this rule chapter, the following words and phrases shall have the respective meanings set forth below unless a different meaning is plainly required by the context:

(1) "Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States or lawfully admitted permanent residents and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans, and any other minorities or individuals certified as disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act (15 U.S.C. 637) and implementing regulations. Individuals in the following groups are presumed to be socially and economically disadvantaged, provided, however, this presumption is rebuttable:

(a) "Black Americans" . . .

(b) "Hispanic Americans" . . .

(c) "Asian-Pacific Americans" . . .

(d) "Native Americans" . . .

(e) "Asian-Indian Americans" . . .

(f) Women.

(2) – (5) [omitted]

14-78.003 General Responsibilities.

(1) In furtherance of the purpose of this rule chapter, the Department shall establish overall DBE goals for its entire DBE program. In setting the overall goals the Department shall consider the following factors:

(a) the number and types of contracts to be awarded by the Department;

(b) the number, capacity, and capabilities of certified DBEs likely to be available to compete for contracts let by the Department; and

(c) the past experience of the Department in meeting its goals and the results and reasons therefor.

(2) To implement its DBE goal program the Department may:

(a) set aside contracts for competition only by, between, or among certified DBEs.

(a)1. - (a)4. [omitted]

(b) establish contract goals on each contract with subcontracting opportunities for certified DBEs.

1. In setting contract goals, the Department shall consider the following factors:

a. the type of work required by the contract to be let;

b. the subcontracting opportunities in the contract to be let;

c. the estimated total dollar amount of the contract to be let; and

d. the number, capacity and capabilities of certified DBEs.

2. [omitted]

3. For all contracts for which DBE contract goals have been established, each bidder shall meet or

exceed or demonstrate that it could not meet, despite its good faith efforts, the contract goals set by the Department. The DBE participation information shall be submitted with the contractor's bid proposal. Award of the contract shall be conditioned upon submission of the DBE participation information with the bid proposal and upon satisfaction of the contract goals or, if the goals are not met, upon demonstrating that good faith efforts were made to meet the goals. Failure to satisfy these requirements shall result in a contractor's bid being deemed nonresponsive and the bid being rejected.

a. The contractor's bid submission shall include the following information:

   i. The names and addresses of certified DBE firms that will participate in the contract;

   ii. A description of the work each named DBE firm will perform;

   iii. The dollar amount of participation by each named DBE firm;

   iv. If the DBE goal is not met, sufficient information to demonstrate that the contractor made good faith efforts to meet the goals.

b. In evaluating a contractor's good faith efforts, the Department will consider:

i. Whether the contractor, at least seven days prior to the letting, provided written notice by certified mail, return receipt requested, or hand delivery, with receipt, to all certified DBEs which perform the type of work which the contractor intends to subcontract, advising the DBEs 1) of the specific work the contractor intends to subcontract; 2) that their interest in the contract is being solicited; and 3) how to obtain information about and review and inspect the contract plans and specifications.

ii. Whether the contractor selected economically feasible portions of the work to be performed by DBEs including where appropriate, breaking down contracts or combining elements of work into economically feasible units. The ability of the contractor to perform the work with its own work force will not in itself excuse a contractor's failure to meet contract goals.

iii. Whether the contractor provided interested DBEs assistance in reviewing the contract plans and specifications.

iv. Whether the DBE goal was met by other bidders.

v. Whether the contractor submits all quotations received from DBEs, and for those quotations not accepted, an explanation of why the DBE will not be used during the course of the contract. Receipt of a lower quotation from a non-DBE will not in itself excuse a contractor's failure to meet contract goals.

vi. Whether the contractor assisted interested DBEs in obtaining any required bonding, lines of credit, or insurance.

vii. Whether the contractor elected to subcontract types of work that match the capabilities of solicited DBEs.

viii. Whether the contractor's efforts were merely pro forma and given all relevant circumstances, could not be reasonably be expected to produce sufficient DBE participation to meet the goals.

ix. Whether the contractor has on other contracts with the past six months utilized DBEs.

This list is not intended to be exclusive or exhaustive and the Department will look not only at the different kinds of efforts that the contractor has made but also the quality, quantity and intensity of these efforts.

4. A certified DBE who is the apparent low bidder on a contract with DBE goals satisfies the DBE goals.

(b)5. - (b)6. [omitted]

(3) [omitted]

(4) In furtherance of the purpose of this rule chapter, the contractor shall have the following responsibilities:

(a) The contractor shall implement a DBE program containing the following elements:

1. A policy statement, expressing a commitment to use DBEs in all aspects of contracting to the maximum extent feasible. . . .

2. The designation of a liaison officer within the contractor's organization, as well as such support staff as may be necessary and proper to administer the program. . . . Techniques to facilitate DBE participation in contracting activities shall include but not be limited to:

a. Soliciting price quotations and arranging a time for the review of plans, quantities, specifications, and delivery schedules, and for the preparation and presentation of quotations.

b. Providing assistance to DBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

c. Carrying out information and communication programs or workshops on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

d. Encouraging eligible DBEs to apply for certification with the Department.

e. Contacting Minority Contractor Associations and city and county agencies with programs for disadvantaged individuals or women for assistance in recruiting and encouraging eligible DBE contractors to apply for certification with the Department.

(b) [omitted]

(c) The contractor shall develop a record keeping system to monitor its DBE affirmative action efforts.

1. The records maintained by the contractor shall include:

   a. the procedures adopted to comply with this rule chapter;

   b. the number of subordinated contracts on department projects awarded to DBEs;

   c. the dollar value of the contracts awarded to DBEs;

   d. the percentage of the dollar value of all subordinated contracts awarded to DBEs as a percentage of the total contract amount;

   e. a description of the general categories of contracts awarded to DBEs; and

   f. the specific efforts employed to identify and award contracts to DBEs.

2. The records maintained by the contractor in accordance with this rule shall be provided upon request to the Department for review.

14-78.005 - 14-78.009

[omitted]